Supreme Court, U.S.
FILED
DEC 10 1991
OFFICE OF THE CLERK

91-944

No. _____

In The Supreme Court of the United States October Term, 1991

COOPER ELECTRIC SUPPLY CO.
***and* RICHARD A. COOPER,**
Petitioners,

vs.

LYNN MARTIN, *Secretary of Labor,*
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RUSSELL M. WOODS
11 Commerce Drive
Cranford, NJ 07016
(908) 276-8800
Counsel of Record and Attorney for Petitioners Cooper Electric Supply Co. and Richard A. Cooper

of Counsel
WOODS AND TREMBULAK
11 Commerce Drive
Cranford, NJ 07016
(908) 276-8800

ARMI®
Legal Copies of America (312) 332-2764

QUESTIONS PRESENTED

1. Are inside salespersons who meet all the requirements for exempt administrative personnel under the Fair Labor Standards Act and Regulations nonexempt because such persons engage in duties that produce sales?

2. Did the court of appeals err in ruling as a matter of law that inside salespersons do not perform work of substantial importance to the management or operation of an electrical wholesaler-distributor's business?

3. Did the court of appeals err in reversing the district court decision holding that employer acted in good faith in following well-established and widely accepted industry compensation practice without knowingly and willfully intending to avoid compliance with the requirements of the Fair Labor Standards Act?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

LIST OF PARTIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. STATEMENT OF FACTS 3

B. PRIOR PROCEEDINGS 3

REASONS FOR GRANTING THE WRIT 4

I. RULINGS BELOW THREATEN SEVERE ADVERSE STARE DECISIS IMPACT THROUGH ERRONEOUS INTERPRETATION OF EXISTING REGULATIONS 4

II. ERRONEOUS INTERPRETATION OF INSIDE SALESPERSONS' FUNCTION AS "PRODUCTION" UNDERMINES HISTORICAL CONGRESSIONAL INTENT 8

III. ERRONEOUS RULING THAT WHOLESALE INSIDE SALESPERSONS DO NOT PERFORM WORK OF SUBSTANTIAL IMPORTANCE TOTALLY IGNORES REALITY 12

IV. APPELLATE COURT REVERSAL OF DISTRICT COURT ON LIQUIDATED DAMAGES ISSUE CREATES ONEROUS NEW LEGAL OBLIGATIONS FAR ABOVE GOOD FAITH STANDARD 16

CONCLUSION 19

APPENDICES:

APPENDIX A: Order and Opinion of the United States Court of Appeals for the Third Circuit (August 8, 1991) with order denying petition for rehearing (September 13, 1991)..... A1-A28

APPENDIX B: Opinion and Order of the United States District Court for the District of New Jersey dated May 17, 1990 and amendment thereto dated May 22, 1990 with Judgment of Court dated June 19, 1990. ..... B1-B17

APPENDIX C: Appendix of Statutes and Regulations C1-C2

TABLE OF AUTHORITIES

CASES: **PAGE**

Brock v. Claridge Hotel and Casino, 711 F.Supp. 779 (D.N.J. 1989) 17

E.C. Schroeder Co. v. Clifton, 153 F.2d 385 (10th Cir. 1946) 10, 10 n.4, 12

Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52 (8th Cir. 1940) 12 n.6

Gilstrap v. Synalloy Corp. Indus. Piping Supply, 409 F.Supp. 621 (M.D.La. 1976) 14 n.9

Goldberg. v. Arkansas Best Freight System, 206 F.Supp. 828, (W.D. Arkansas 1962) 13

Hodgson v. Penn Packing Co., 335 F.Supp. 1015 (E.D. Pa. 1971) 7, 14 n.9

Martin v. Cooper Elec. Supply Co., 940 F.2d 896 (3rd Cir. 1991) 1

McComb vs. N.Y. & New Brunswick Auto Exp. Co., 95 F.Supp. 636 (D. N.J. 1950) 8

McLeod v. Threlkeld, 319 U.S. 491 (1943) 10

Mitchell v. H.B. Zachry Co., 362 U.S. 310 (1960) 13 n.7

Remer v. Czaja, 36 F.Supp. 629 (D.C.Md. 1941) 11 n.5

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) 11

Walling v. General Industries Co., 330 U.S. 545 (1947) 13 n.8

White v. Beckman Dairy Company, 352 F.Supp. 1266, 1285 (W.D. Ark. 1973) 18

Williams v. Tri-County Growers, Inc., 747 F.2d 1 21 (3rd Cir. 1984) 17

Wirtz v. B. B. Saxon Company, 365 F.2d 457, 460 (5th. Cir. 1966) 10 n.3

STATUTES AND REGULATIONS:

28 U.S.C. 1254(1) 2

29 C.F.R. 541.105(a) 11

29 C.F.R. 207(d)(2) 4, 15

29 C.F.R. 541.2(a)-(e) 6

29 C.F.R. 541.201(b) 7

29 C.F.R. 541.205(a) 2, 6, 7, 12, 14

29 C.F.R. 541.205(c) 2, 12, 14, 15

29 C.F.R. 541.214(a) 6

29 C.F.R. 541.214 6

29 C.F.R. 541.2(e)(2) 6

Portal to Portal Act, 29 U.S.C. 260 16

29 U.S.C. 206(a) 12

29 U.S.C. 207(a) 12

29 U.S.C.A. 203(b) 9

29 U.S.C.A. 203(j) 9

29 U.S.C.A. 203(s) 11, 12

Senate Report on the 1961 Amendments,
Senate Report No. 1487, 87th Congress 1st Session
(1961) *as reported in* U.S. Code Cong. and Admin.
News 1961, p. 1623 ..... 9 n.2

LIST OF PARTIES

The parties to the proceeding below were petitioners, Cooper Electric Supply Co., and Richard A. Cooper and respondents, Elizabeth Dole, Secretary of Labor, Lynn Martin, Secretary of Labor and United States Department of Labor.

No. _____

In The
Supreme Court of the United States
October Term, 1991

COOPER ELECTRIC SUPPLY CO.
***and* RICHARD A. COOPER,**
Petitioners,

vs.

LYNN MARTIN, *Secretary of Labor,*
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 940 F.2d 896 (3rd Cir. 1991) and is printed as Appendix A. The Opinion and amendment thereto of the United States District Court for the District of New Jersey is unreported and is reprinted as Appendix B.

JURISDICTION

The original opinion of the Court of Appeals for the Third Circuit was entered on August 8, 1991. Following a timely petition for rehearing, the court of appeals entered an order denying the petition for rehearing on September 13, 1991. The order denying the petition for rehearing is set forth as a preface to the opinion

of the Court of Appeals for the Third Circuit. (A-1)[1]

This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are the Fair Labor Standards Act, as amended, 29 U.S.C. 201, *et seq.*, the "Act," and the regulations adopted thereunder, 29 C.F.R. 2, *et seq.*, the "Regulations," pertinent portions of which are reprinted in the Appendix of Statutes and Regulations, *infra*, p. C-1, *se seq.*

STATEMENT OF THE CASE

The critically important issue raised by this case is whether inside salespersons of a wholesaler-distributor who meet all the requirements for exempt administrative personnel under the Act and Regulations can be declared non-exempt because such persons engage in duties that produce sales and that as such it follows that as a matter of law, such work is not of substantial importance to the management or operations of a wholesaler-distributor's business. The court of appeals answered the question by denying such exemption holding:

> "... as a matter of law that Cooper's inside salespersons do not perform work of substantial importance to the management or operation of Cooper's business within the meaning of 29 C.F.R. 541.205(a) and (c)." (A-18)

The court went on to hold that the employer who relied upon its good faith interpretation of the requirements of the Act and Regulations and who was found to be acting in good faith by the district court is nevertheless held to be not acting in reasonable good faith because it failed to take affirmative steps to ascertain the Act's requirements as interpreted by the Court of Appeals before the onset of a Labor Department investigation. Thus, a second critically important issue in this case results from this portion of the decision of the lower court. That issue is, whether

[1] References to "A" are to Appendix A, the Court of Appeals Opinion; references to "B" are to Appendix B, the District Court Opinion; references to "C" are to excerpts of the Fair Labor Standards Act and the Department of Labor's Wage-Hour Division Regulations.

an employer can ever act in good faith in determining its compliance obligations under a particular statute where such determination may be subject to ex post facto considerations with retrospective application.

A. STATEMENT OF FACTS

Petitioner Cooper Electric Supply Co. conducts its business at three locations in New Jersey. The company is engaged in the business of wholesale-distribution of electrical products. It employs approximately 120 employees, including inside salespersons, counter salespersons, outside salespersons, purchasing agents and various clerical personnel handling payroll, receivables and credit.

Counter salespersons are paid on an hourly basis and are not considered by Cooper to be exempt under the Act and Regulations. Inside salespersons are paid on a salaried basis coupled with an incentive bonus program and are considered by Cooper to be exempt under the Act and Regulations. All of the inside salespersons earn substantially in excess of $250 per week.

Inside salespersons represent the company in its relationships with its customers. Their primary duties are promoting and negotiating sales on behalf of the company. In performing their duties, the inside salespersons are required to have a strong knowledge of the market and the customers of the company as well as significant technical expertise. Each inside salesperson develops a strong customer base and provides various services on behalf of the company for the benefit of the customers. Incentives offered to inside salespersons of the company are designed to encourage the exercise of very broad discretion in a manner that is profitable to both the company and the employee. Inside salespersons negotiate price with the customers thereby increasing or decreasing the company's profit margins and also negotiate costs on a daily basis with the vendors who supply products to the company.

B. PRIOR PROCEEDINGS

The Secretary of Labor filed its complaint in this matter on July 2, 1987. Following a bench trial in the United States

District Court for the District of New Jersey, the district court on May 17, 1990 ruled that Cooper Electric Supply Co., Inc. and its President, Richard Cooper, (collectively "Cooper") violated the overtime pay and recordkeeping provisions of the Act and entered judgment on June 19, 1990 for overtime compensation due employees of Cooper in the amount of $74,144.51 with pre-judgment interest due employees in the amount of $26,291.64. The court refused to award liquidated damages on top of the compensatory damages.

The parties cross-appealed to the United States Court of Appeals for the Third Circuit. On appeal, Cooper contended that the district court erred by concluding that its inside salespersons were not bona fide "administrative" employees eligible for a statutory exemption from the Act's overtime and recordkeeping requirements. The Secretary of Labor ("Labor") contended that the district court erred by refusing to award liquidated damages.

The court of appeals on August 8, 1991 affirmed the district court's decision that Cooper's inside salespersons are not exempt from the Act's requirements and reversed the district court's denial of liquidated damages, vacating the district court's award of pre-judgment interest and remanding for an award of liquidated damages.

Following a timely petition for rehearing filed by Cooper, the Court of Appeals entered an order denying the petition for rehearing on September 13, 1991.

REASONS FOR GRANTING THE WRIT

I. RULINGS BELOW THREATEN SEVERE ADVERSE STARE DECISIS IMPACT THROUGH ERRONEOUS INTERPRETATION OF EXISTING REGULATIONS

1. Prior to the decisions of the courts below, existing statutes and regulations provided for an "administrative exemption" from the overtime and recordkeeping requirements of the Act which was clearly applicable to wholesale sales personnel. Indeed, interpretive regulations identified certain wholesale sales personnel as examples of employees entitled to the administrative exemption. 29 C.F.R. §207(d)(2). The decisions below judicially

sanction an amendment of applicable law, not by adoption or amendment of regulations, but by a new and novel interpretation of an existing rule that has been relied upon by countless employers in their determination of the overtime status of certain employees.

This disregard of both legislative intent and existing regulations results from a myopic concentration upon the single word "production" and would effectively repeal precisely what Congress meant to provide — the administrative exemption under the Act. Employers throughout the United States have been left in an untenable position. They can no longer rely on the literal language of statutes and regulations. For if they do, subsequent creative interpretation of otherwise clear language may leave them subject not only to overtime requirements, but liquidated penalties as well.

It has long been recognized that wholesale sales work is a function performed outside of the production process. The decisions below erroneously include the work of an inside salesperson in a wholesale establishment within the realm of a production worker, an interpretation never intended by Congress and beyond the common sense meaning of the word "production".

The title of inside salesperson in the wholesale-distribution industry is traditional but not descriptive of actual job duties and responsibilities. A wholesale inside salesperson in the electrical distribution industry, which is the industry in which Cooper is engaged, is a consultant to customers, educating them on wholesale products and their uses, advising as to those products best used and providing those products just in time for effective use by such customers. These functions were erroneously characterized by the courts below as the "production of sales" which must according to those same courts be excluded from exemption.

The broad usage of the term "production" as adopted by the courts below was never envisioned by Congress or the writers of the implementing regulations. Such a strained interpretation can only result in a substantially adverse effect upon the public served by the wholesale-distribution industry, the industry in

general, and Cooper in particular. It is thus of exceptional importance meriting a grant of certiorari.

2. To determine whether a wholesale inside salesperson is statutorily exempt as an administrator from the Act's minimum wage and overtime provisions requires reference to either the Department of Labor's "long" or "short" tests of bona fide administrative status. *See* 29 C.F.R. §541.2(a)-(e) ("long test"); 29 C.F.R. §§541.2(e)(2) and 541.214 ("short test"). Under the two-prong "short test" for employees earning not less than $250 per week, the initial consideration is whether the work is "directly related to management policies or general business operations." 29 C.F.R. §541.214(a). Failure to meet this threshold burden prevents an employee from attaining exempt status.

The language of the first prong criterion is further expounded on in 29 C.F.R. §541.205(a):

> " 'directly related to management policies or general business operations' describes those types of activities relating to the administrative operations of a business as distinguished from 'production' or in a retail or service establishment 'sales' work."

The courts below erroneously determined that wholesale sales work was not "directly related to management policies or general business operations" because it was "production" work. This determination was made irrespective of the definite meaning ascribed to the particular term "production" as used in the Regulations. Under such a definition, no employee of a wholesale-distributor operation could meet the primary criteria for administrative work. In finding wholesale inside salespersons to be "production" workers, the rulings below depart from established precedent, from practicality and from Congressional intent.

3. The regulations are not in question. The interpretation of the regulations is in question. By eliminating wholesale inside salespersons such as those of Cooper, the Department of Labor is embarking into new interpretative territories which distort all sense of rationality, which radically depart from reason, and which in effect and for all practical purposes eliminate the administration exemption. The radical novelty of this approach further buttresses the need for certiorari.

There is enormous potential for adverse *stare decisis* impact. The impact of such a strained interpretation of the regulations is alone dispositive of any question that, absent certiorari, the protection of the interests of Cooper and of wholesaler-distributors who utilize inside salespersons as an integral and important part of their general business operation would be impaired or imperiled.

4. The courts below admitted that the responsibilities of the Cooper inside salespersons did meet the literal language of the interpretative regulations for exemption (A-15, B-12) but then inexplicably proceeded to brush this important observation of fact aside and to rule, as a matter of law, that such activities, while exempt under the Act and its implementing Regulations, nevertheless are "part and parcel" of the activity of "producing sales" and as such are non-exempt. Such a conclusion is contrary to law. There is no reason why an inside salesperson who meets all the requirements for an administrative exemption should not be exempt under the Act. *Hodgson v. Penn Packing Co.*, 335 F.Supp. 1015 (E.D. Pa. 1971)

Title alone does not portray facts. An inside salesperson is first, last and foremost a company representative performing work of utmost importance to the general business operation of the company. Titles are insufficient as yardsticks. 29 C.F.R. §541.201(b). A person cannot be considered non-exempt because that party is engaged in sales activities. Not a single statute or regulation precludes application of the exemption from wholesale salesmen. As already noted, the regulations include the position of wholesale salesmen as an example of positions which qualify for the exemption. Equally significant is the fact that the regulations specifically and exclusively exclude retail sales from the administrative exemption. 29 C.F.R. §541.205(a). The interpretation embraced by the courts below would eliminate the exemption for numerous managerial persons who over the span of many years have been considered exempt even though their primary responsibility is the management and production of sales for their employer. To change now, through such a strained and unreasonable interpretation of existing regulations, would wreak legal havoc on those who over the years have taken all reasonable steps to comply with the Act and the current interpretations thereof.

5. Under the Regulations, duties, responsibilities and salary are controlling in any determination of overtime exemption. Salaries are not an issue in this case since Cooper inside salespersons meet the salary test by a considerable margin. Duties and responsibilities are an issue. Particularly relevant is the ruling of the district court in *McComb vs. N.Y. & New Brunswick Auto Exp. Co.*, 95 F.Supp. 636 (D. N.J. 1950) where it was held that the employees working under the title of dispatchers were held to be a team that *administered* the *actual commodity* the employer *sold* — namely — the collection and delivery of goods — and were exempt from overtime as administrative employees. Cooper inside salespersons are engaged in the sale, purchase and delivery of goods. Their duties are totally directed to that end in the same manner as the dispatchers in *McComb*, a factor that has been ignored by the courts below, who persist in attempting to portray such activities of the inside salespersons as "production" and thus not exempt, in effect nullifying substantially all administrative exemptions.

This case requires a thorough review in order to determine whether the rulings below were based upon consideration of relevant facts or single words with assigned meanings of an extremely narrow nature. Without such a review by this court through certiorari, the newly expounded and clearly erroneous conclusions of the courts below threaten severe adverse *stare decisis* impact on an entire industry.

II. ERRONEOUS INTERPRETATION OF INSIDE SALESPERSONS' FUNCTION AS "PRODUCTION" UNDERMINES HISTORICAL CONGRESSIONAL INTENT

1. The Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §201 et seq., enacted a comprehensive scheme providing for minimum wages and overtime pay for workers "engaged in" or "in the production of goods for" interstate and foreign commerce. Throughout the history of the Act, it has been recognized that the wholesale industry is subject to the Act's provisions because of its operations in interstate commerce. The decision of this Court in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1942), affirmed the holding by the Fifth Circuit Court of Appeals that "(wholesale) employees who engaged in the

procurement or receipt of goods from other states are 'engaged in commerce' within the meaning of §6(a) and §7(a) of the Act." 317 U.S. at 566.

This is further underscored by legislative history which shows that Congress intended wholesalers to be treated as being "engaged in" commerce:

> "Thus the present act covers wholesalers and, in fact, retailers also, even if they are located entirely within one State if they purchase goods from outside the state, or sell them across state lines and thereby *engage* in interstate commerce. (emphasis added)[2]

The two main bases of coverage of the Act are employees engaged in commerce and employees engaged in the production of goods for commerce. Congress did not intend to give the term "engaged in commerce" the same meaning as the term "engaged in the production of goods for commerce." The Act defines "Commerce" to mean "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C.A. §203(b). " 'Produced' means produced, manufactured, mined, handled or in any other manner worked on in any State; and for purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." 29 U.S.C.A. §203(j).

This Court has recognized the distinctive nature of the types of employment. "The test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce." *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). The difference, as explained by the Fifth Circuit Court of Appeals, is the nature of the activity performed and "the closeness of the relationship between the person and the activity . . .":

---

[2] Senate Report on the 1961 Amendments, Senate Report No. 1487, 87th Congress 1st Session (1961) *as reported in* U.S. Code Cong. and Admin. News 1961, p. 1623.

> "For one to be engaged in the production of goods for commerce within this Act, he need only be engaged in a closely related process or occupation directly essential to production, whereas to be in commerce, one must be in commerce itself."[3]

It is this very distinction that the decisions below explicitly undermine by establishing as a rule of law that, when implementing and interpreting the Department of Labor's Wage and Hour Division's regulations, an inside salesperson of a wholesale-distributor may be considered a "production" employee for purposes of analysis for overtime coverage.

Such a reading attributes to Congress a purpose that goes beyond its stated finding that wholesalers are "engaged in commerce" and not "the production of goods in commerce." To be considered as falling within the statutory definition of "produced," an activity must be clearly related to a process or occupation directly essential to the production of goods. 29 U.S.C.A. §203(j). Wholesale sales do not fall within this standard. In *E.C. Schroeder Co. v. Clifton*, 153 F.2d 385 (10th Cir. 1946), the question before the Tenth Circuit was whether employees responsible for quarrying and processing cushion gravel and riprap for use in the construction of a railroad and highway were engaged in commerce or in the production of goods for commerce. The appellate court, citing this Court's opinion in *McLeod v. Threlkeld*, 319 U.S. 491 (1943), explained why such activities were not considered as being "engaged in commerce":

> "In order to be engaged in commerce within the scope of the Act, the employee must be actually engaged in the movement of commerce or the service which he performs must be so closely related to it as to be for all practical purposes a part of it. (citations omitted) Employee activities outside of this movement, so far as they are covered by the wage-hour regulation, are governed by the other phrase, 'production of goods for commerce.' "[4]

Wholesale sales are a service closely related to the movement

---

[3] *Wirtz v. B. B. Saxon Company*, 365 F.2d 457, 460 (5th Cir. 1966)

[4] *E.C. Schroeder Co. v. Clifton*, 153 F.2d at 340 (10th Cir. 1946)

of commerce. The activity bears the close and immediate tie to commerce that is necessary to be considered as "engaged in commerce" within the scope of the Act.

The court below clearly errs when it assumes that unless its expansive definition of production is accepted, "all workers not actually engaged in tangibles *manufacture* would need to be classified as administrative employees." (emphasis in original)(A-14) There is no coherent reason why the legislative intent to establish an administrative exemption should be ascertained by focusing upon a single word—production. Occupations that do not bear the necessary relationship with the production of goods would not automatically be considered administrative positions, as they would still need to meet the threshold inquiry of whether they were "related to the administrative operations of a business." 29 C.F.R. §541.105(a)

Moreover, the contention that a wholesale inside salesperson is a "production" employee by virtue of an administrative/ productive work dichotomy is inconsistent with the plain meaning of the regulations as a whole. The courts' very limited reading of this specific section of the regulation is taken out of context and betrays the purpose of the remaining regulations.

2. All provisions of the Act must be read together in such a manner that they are consistent with each other.[5] The lower courts properly recognized that the regulations of the Department of Labor "constitute the agency's body of experience and informed judgment" about the statute, and that they should be given "considerable and in some cases decisive weight." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *cited with approval at A-8.* Yet the court disregards the specific usage of "production" in the Act.

What is important is that Congress intended that sales be treated as a function separate from the "production of goods for commerce." An indisputable example is the "enterprise" coverage, added to the Act in 1961 by amendment. The 1961 amendments — namely §203(s) — inserted the phrase "handling, selling, or otherwise working on goods or materials" to bring within coverage of the Act enterprises that had neither employees

[5] *Remer v. Czaja*, 36 F.Supp. 629 (D.C.Md. 1941)

engaged in interstate commerce nor in the production of goods for commerce. 29 U.S.C. §§206(a) and 207(a). Congressional finding and declarations of policy must be used to ascertain the intent and meaning of provisions susceptible to various construction.[6] If Congress had intended to include sales as an adjunct activity within the purview of the term "production", it certainly would not have been included in §203(s).

As stated by the Tenth Circuit Court of Appeals in *E.C. Schroeder Co. v. Clifton.*, 153 F.2d 385, 390 (10th Cir. 1946):

> "The Act is to be accorded a liberal construction. But the function of judicial interpretation of a statute is to bring out and give effect to that which is already in it, latent or otherwise. It is not to add new provisions, substantive or otherwise, which the legislative tribunal in the exercise of its permitted choice omitted or withheld."

Indeed, no other case has found wholesale sales to be production activity and, in light of the Act's legislative history, it would be unreasonable to believe Congress intended to preclude a wholesale inside salesperson from the Act's administrative exemption because he was performing what is erroneously interpreted to be "production" work.

Review of this matter by this Court is necessary to preclude the disastrous effects when interpretations of the Act and its Regulations are changed literally in midstream in such a manner as to undermine historical Congressional intent.

III. ERRONEOUS RULING THAT WHOLESALE INSIDE SALESPERSONS DO NOT PERFORM WORK OF SUBSTANTIAL IMPORTANCE TOTALLY IGNORES REALITY

1. Deciding that inside salespersons do not undertake "major assignments": within the meaning of 29 C.F.R. §541.205(c), the Court of Appeals held as a matter of law, that Cooper's inside salespersons do not perform "work of substantial importance to the management or operation" of Cooper's business within the meaning of 29 C.F.R. §541.205(a) and (c). (A-18)

---

[6] *Fleming v. Hawkeye Pearl Button Co.*, 113 F.2d 52 (8th Cir. 1940)

Such a clearly erroneous ruling totally ignores reality. The question that must first be answered according to the applicable regulations is whether the work is office or non-manual field work. There is no question but that the work of Cooper's inside salespersons is office work. The second question to be answered is whether that work is directly related to the general business operation of the employer. This condition also is met.

The general business operation of a wholesaler-distributor is to provide its customers with the appropriate goods and services as and when needed in the most efficient manner possible. The essence of wholesale-distribution is sales and service. What is important for the purposes of the administrative exemption is whether the activities of the wholesale inside salesperson contribute in a substantial matter to the general business operations of the employer. This is a matter for factual determination, not determination as dictated by the Appellate Court's ruling "as a matter of law."

2. The many adjudicated cases also establish that each case presents primarily a question largely factual in nature. Thus, a manager of a trucking company's spare parts department, responsible for the purchase and sale of the parts in connection with repair operations, was held to be exempt because as a factual matter his work was held to be directly related to management policies and the business operations of the employer. *Goldberg v. Arkansas Best Freight System*, 206 F.Supp. 828, (W.D. Arkansas 1962).

Inside salespersons in the wholesale-distribution industry serve the needs of manufacturers and consumers by providing the channels of distribution that bring both parties together in an efficient and economic manner. It is well settled that little significance is accorded a job title or job description in evaluating an employee's work, nor should the employer's business purpose be the determinant factor of an employee's exempt status.[7] Exemptions are to be applied after a detailed factual examination of the duties of the employee.[8]

---

[7] *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310 (1960)

[8] *Walling v. General Industries Co.*, 330 U.S. 545 (1947).

The Appellate Court ruled erroneously that, as a matter of law, Cooper's inside salespeople do not perform work of substantial importance to the management or operation of Cooper's business because, "only employees whose work substantially affects the structure of an employer's business operations and management policies" will qualify. (A-18, 19) The court's cursory treatment of this point does not fully examine the language of the Department of Labor regulations, nor provide any comprehensive analysis. It appears to categorically dismiss portions of the regulation so as to arrive at an assessment that only work that affects the structure of a business is substantial and administrative. Subsection "c" of 29 C.F.R. §541.205 describes "work of substantial importance" as follows:

> ".... is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employers whose work is directly related to management policies or to general business operations include those [whose] *work affects policy or whose responsibility it is to execute or carry it out* ...." (emphasis supplied).

Subsection "a" of the same regulation reads that the exemption extends to employees who perform work of substantial importance to the management or operation of the business of the employer or to the *employer's customers.*

It is significant to note that in two actual cases involving inside salespersons with responsibilities similar to those employed by Cooper it was specifically held that an inside salesperson who meets the test for administrative personnel may be exempt from the Act.[9] No mention is made of the production of sales argument that was so conclusive to the Third Circuit. The focus of the courts involved in this case has been misplaced. It unreasonably rests on a determination of whether inside salespeople are production employees, rather than on whether these employees in a service industry "perform work of substantial importance to the operation of the business" to qualify as administratively exempt.

---

[9] *Hodgson v. Penn Packing co.*, 335 F.Supp. 1015 (E.D.Pa. 1971); *Gilstrap v. Synalloy Corp. Indus. Piping Supply*, 409 F.Supp. 621 (M.D.La. 1976)

3. Further, the Department of Labor's own regulatory interpretation of "discretion and independent judgment" holds out "certain wholesale salesmen" as examples of employees exercising the requisite discretion and independent judgment to meet the Act's administrative exemption. 29 C.F.R. § 207(d)(2). The courts below make no mention of this important interpretation as it would render their conclusions virtually impossible.

The role of the inside salesperson in wholesale distribution is to act as the sole liaison between the customer and the employer. All operations and management policies must be represented by the inside salesperson. Inside salespersons not only influence policy, but they have the responsibility to carry out policy which meets the standard set forth in 29 C.F.R. C.F.R. §541.205(c). In addition, the inside salesperson serves as adviser and consultant to the customers on the types of products available and necessary for certain operations. The customer looks to the inside salesperson for professional counsel and guidance in its purchases.

The district court finding that Cooper's inside sales staff did not "implement specific work assignments consistent with an overall company policy," is clearly erroneous. Inside sales are the cornerstone of Cooper Electric's operations, and the inside sales force has the most frequent and direct contact with the customers. Policy decisions made at the executive level are executed through the large inside sales staff.

The fallacy of the opinions of the lower courts in this case is that they established an "either production or administrative" syllogism and sought to pigeonhole inside sales as a "production" factum, holding inside salespersons to be unimportant to their employers "as a matter of law."

Another compelling reason for this Court to grant review is the urgent need to prevent the serious adverse consequences of the clearly erroneous ruling of the court below that the importance of inside salespersons to their employers is a matter of law rather than a matter of fact.

IV. APPELLATE COURT REVERSAL OF DISTRICT COURT ON LIQUIDATED DAMAGES ISSUE CREATES ONEROUS NEW LEGAL OBLIGATIONS FAR ABOVE GOOD FAITH STANDARD

1. In holding that the district court erred as a matter of law by concluding that Cooper violated the Act's requirements because it failed to take affirmative steps sanctioned by the court to determine if its employees qualified for the exemption, the Appellate Court created a new and onerous "good faith" standard. Such a holding is tantamount to a requirement that employers take affirmative steps to comply with a constantly moving target and to anticipate future developments in the law. It negated any good faith reliance on previous interpretations of the rules and creates an onerous new legal obligation far and above any previously applied good faith standard.

2. The decision of the Appellate Court, which is contrary to the factual finding of the district court, must be viewed as wholly unfair. It is capable of creating catastrophic shock waves throughout the entire business community, which constantly seeks an understandable and workable way in which to try to comply with the Act.

Employers who follow the literal and common sense meaning of the regulations will find no safe haven in their apparent compliance. None will be safe from the possibility that regulatory agencies will develop clever rationales designed to extend their jurisdiction without the benefit or necessity of a statutory or regulatory amendment.

3. Cooper fully complied with any fair reading of the existing regulations. This was the holding of the district court. The company followed well established and accepted industry practice. Regardless of any decision on the issue of the administrative exemption, petitioner is entitled to the "good faith" exception permitted by the Portal to Portal Act. 29 U.S.C. §260.

The district court found that Cooper had acted in good faith by following well established and widely accepted industry practice and by working with the Department of Labor to correct

practices and procedures which were inconsistent with the Act. The trial judge also found that there was a "good faith" dispute as to the applicability of the requirements of the Act to the inside sales personnel. These factors have all previously been considered by the United States District Court for the District of New Jersey in refusing to award liquidated damages. *Brock v. Claridge Hotel and Casino*, 711 F.Supp. 779 (D.N.J. 1989). Nevertheless, the Appellate Court, relying primarily on *Williams v. Tri-County Growers, Inc.*, 747 F.2d 1 21 (3rd Cir. 1984), found none of these factors justified disallowance of liquidated damages.

4. A fair reading of the Appellate Court's decision indicates that the only way an employer can avoid liquidated damages is by undertaking a specific and detailed legal analysis of the Act as it relates to each and every employee. The analysis must continue on a minute by minute basis so as to be assured of compliance with interpretations of the Department of Labor as changed from time to time. Ironical in this case is that had such an analysis occurred, a reasonably prudent adviser would have advised the client that the regulations contemplate that wholesale inside salespersons such as the type employed by Cooper are exempt from the overtime requirements of the Act. It is not beyond the realm of possibility that, given the holding in this case, an adviser exercising unlimited caution, would be forced to withhold advice pending resort to declaratory relief from a court.

It is hard to imagine a more anomalous result. When extant regulations can be fairly read to make an administrative exemption applicable, no liquidated penalties should be permitted. To hold otherwise is to reward the Department of Labor for ambiguity while punishing employers for acting in apparent compliance with the law.

5. The decisions below have essentially made retroactive a new substantive requirement of the Act holding an employer to the test of knowing that such an interpretive development in the law would occur. Common sense and fundamental fairness suggest that this cannot be permitted. To allow the Department of Labor as well as any other regulatory agency to amend their regulations in this manner, subjects employers throughout the country to the harsh and harmful effects of the imposition of

sanctions such as liquidated penalties without fair notice of the rules against which their conduct will be tested.

Affirmation of the ruling of the appellate court in this case surely raises the requirement of "good faith" to a level that, short of declaratory relief, employers cannot meet. Such a ruling ignores and wholly modifies and then applies its onerous burden retroactively in a manner that subjects employers to significant financial penalties. Surely these penalties are being applied in a way never intended by Congress. The decisions below create "[a] sword on which to impale an unsuspecting employer who is engaged in a business and honestly exercises a reasonable effort in good faith to comply with all required provisions of the act." *White v. Beckman Dairy Company*, 352 F.Supp. 1266, 1285 (W.D.Ark. 1973).

The fundamental unfairness of imposing the penalty on such a basis is apparent. The chilling effect on the business community should be a matter of concern for this Court. Regulations which shape the way the business community operates will no longer provide real guidance since they can be amended by administrative or judicial fiat. The slightest hint of ambiguity or uncertainty will force the employer, fearful of penalties, to pursue declaratory relief, clogging our courts and dangerously burdening commerce.

This is a matter requiring the urgent attention of this Court, through granting of a writ of certiorari.

CONCLUSION

For the foregoing reasons, we respectfully submit that a writ of certiorari be granted.

Respectfully submitted,

RUSSELL M. WOODS
11 Commerce Drive
Cranford, NJ 07016
(908) 276-8800

Counsel of Record and Attorney for Petitioners Cooper Electric Supply Co. and Richard A. Cooper

Of Counsel

WOODS AND TREMBULAK
11 Commerce Drive
Cranford, NJ 07016
(908) 276-8800

APPENDICES

APPENDICES

APPENDIX A:	Order and Opinion of the United States Court of Appeals for the Third Circuit (August 8, 1991) with order denying petition for rehearing (September 13, 1991)
APPENDIX B:	Opinion and Order of the United States District Court for the District of New Jersey dated May 17, 1990 and amendment thereto dated May 22, 1990 with Judgment of Court dated June 19, 1990.
APPENDIX C:	Appendix of Statutes and Regulations

APPENDIX A:

Order and Opinion of the United States Court of Appeals for the Third Circuit (August 8, 1991) with order denying petition for rehearing (September 13, 1991)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5690

LYNN MARTIN, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR

V.

COOPER ELECTRIC SUPPLY CO., a Corporation,
and RICHARD A. COOPER, Individually,
Appellants

V.

NATIONAL ASSOCIATION OF
WHOLESALER-DISTRIBUTORS, and NATIONAL
ASSOCIATION OF ELECTRICAL DISTRIBUTORS,
Amicus-Appellants

No. 90-5785

LYNN MARTIN, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,
Appellant

V.

COOPER ELECTRIC SUPPLY CO.,
A Corporation, and
RICHARD A. COOPER, Individually

SUR PETITION FOR REHEARING

Present: **SLOVITER,** *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, and HIGGINBOTHAM* *Circuit Judges*

The petition for rehearing filed by appellants Cooper Electric Supply Co., Inc. and Richard A. Cooper, and amicus-appellants National Association of Wholesale-Distributors and National Association of Electrical Distributors, in the above-entitled case

having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: SEP 13 1991

---

*Judge Higginbotham voted only on panel rehearing.

Filed August 8, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5690

LYNN MARTIN, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR

V.

COOPER ELECTRIC SUPPLY CO., a Corporation,
and RICHARD A. COOPER, Individually,
Appellants

V.

NATIONAL ASSOCIATION OF
WHOLESALER-DISTRIBUTORS, and NATIONAL
ASSOCIATION OF ELECTRICAL DISTRIBUTORS,
Amicus-Appellants

No. 90-5785

LYNN MARTIN, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,
Appellant

V.

COPPER ELECTRIC SUPPLY CO.,
A Corporation, and
RICHARD A. COOPER, Individually

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Action No. 87-02568)

Argued March 5, 1991

Before: BECKER, NYGAARD and HIGGINBOTHAM, *Circuit Judges*
(Opinion Filed August 8, 1991)

RUSSELL M. WOODS, ESQUIRE (Argued)
Woods & Trembulak
11 Commerce Drive
Cranford, NJ 07016

Attorney for Appellants/ Cross-Appellees

WILLIAM J. STONE, ESQUIRE (Argued)
WENDY BADER, ESQUIRE
United States Depatment of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attorneys for Appellee/ Cross-Appellant

LOUIS R. MARCHESE, ESQUIRE (Argued)
Halfpenny, Hahn, Roche & Marchese
20 North Wacker Drive
Chicago, IL 60606

Attorney for Amicus-Appellant

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

These cross-appeals follow a bench trial in which the district court decided that Cooper Electric Supply Co., Inc. and its President, Richard Cooper, (collectively, "Cooper") violated the overtime pay and record keeping provisions of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ("FLSA" or "Act"). Cooper contends the district court erred by concluding that Cooper's inside salespersons were not bona fide "administrative" employees, hence eligible for a statutory exemption from the Act's overtime and record keeping requirements.[1] The Secretary of Labor ("Labor") contends the district court erred by refusing to award liquidated damages on top of compensatory damages for Cooper's violations.

We will affirm the district court's decision that Cooper's inside salespersons are not exempt from the Act's requirements, but will reverse the district court's denial of liquidated damages and vacate the court's denial of liquidated damages and vacate the court's award of prejudgment interest.

I. PROCEDURE

Cooper Electric Supply Co., Inc. is a New Jersey corporation. Its primary business is selling electrical products. Cooper employs approximately 120 people including inside salespersons, counter salespersons, outside salespersons, purchasing agents and various clerical functionaries who handle payroll, receivables and credit.

In 1987, after Labor investigated Cooper's pay practices, it filed this action alleging that since 1985, Cooper had violated the overtime and record keeping provisions of the Act with respect to some of its employees, namely, assistant warehouse managers, computer operators, purchasing agents and inside salespersons. The Act requires that overtime wages, equivalent to one-and-one-half times the regular pay rate, be paid to employees who

---

[1] The National Association of Electrical Distributors and National Association of Wholesaler-Distributors have filed *amicus* briefs in Cooper's appeal. Like Cooper, *amici* argue that Cooper's inside salespersons and similar wholesale sales industry salespeople *do* qualify for the statutory exemption.

work in excess of 40 hours per week. *See* 29 U.S.C. § 207.

Labor sought to have Cooper pay outstanding unpaid overtime compensation, and to enjoin Cooper from violating the Act. Pursuant to section 16(c) of the Act, 29 U.S.C. § 216(c), Labor also requested that Cooper pay either liquidated damages in amounts equal to their unpaid compensation, or prejudgment interest.

In the Final Pretrial Order, Cooper stipulated that its assistant warehouse managers and computer operators were not exempt from the Act's record keeping and overtime pay provisions. Accordingly, the district court eventually awarded these employees unpaid overtime compensation and prejudgment interest.

The company took the position that its inside salespersons and purchasing agents were bona fide "administrative" employees, exempt from the Act's overtime pay requirements under section 13(a)(1) of the statute, 29 U.S.C. § 213(a)(1).[2] That section exempts employees occupying "bona fide executive, administrative or professional" positions from the maximum hour provisions of the FLSA; it also empowers the Secretary of Labor to define the statute's operative terms.

The district court decided Cooper had violated the Act's overtime and record keeping provisions as charged. The court concluded that the employees identified in Labor's complaint were entitled to the overtime pay mandated by the Act. It entered a $74,144 judgment against Cooper equal to the employees' unpaid overtime wages, and awarded them $26,291 in prejudgment interest. The district court did not award the liquidated damages requested by Labor, nor did it permanently enjoin Cooper from violating the Act's overtime pay and record keeping requirements.

The district court applied regulatory interpretations of section 13(a)(1) to determine that Cooper's inside salespersons and purchasing agents were not "administrative" employees eligible for the statutory exemption because they do not perform work

---

[2] Cooper asserted also that its inside salesperson and purchasing agents were exempt under section 13(a)(1) as "executive" employees; however, the district found no evidence to suppourt that conclusion, and the point is not contested on appeal.

"directly related to [Cooper's] management policies or general business operations". The court reasoned that Cooper's inside salespersons are "productive" rather than "administrative" employees within the meaning of 29 C.F.R. § 541.205(a) & (b); and that they do not perform "work of substantial importance" to Cooper's business within the meaning of 29 C.F.R. § 541.205(a) & (c).

Cooper appealed the district court's determination that Cooper's inside salespersons were not "administrative" employees exempt from FLSA overtime pay provisions.[3] Labor appealed the district court's refusal to award liquidated damages. *Amici* joined Cooper's appeal.

II. EXEMPTION UNDER SECTION 13(a)(1)

A.

We must decide whether the district court erred by concluding that Cooper's inside salespersons are not eligible for section 13(a)(1)'s "administrative" employee exemption from the Act's overtime pay requirements.

Whether Cooper's inside salespersons fall within the exemption is a mixed question of law and fact. We review the district court's findings of historical fact under the "clearly erroneous" standard set forth in Federal Rule of Civil Procedure 52(a). *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14 (1986). *See also Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988) ("We can review the historical facts only for clear error. Whether the district court properly applied these facts to the regulations is a legal question, over which we have plenary review.")

Likewise, where the district court was required to draw factual inferences from historical facts in order to apply Labor's regulations under section 13(a)(1), we review those inferences for clear error too. *Walling v. General Industries Co.*, 330 U.S. 545, 550 (1947) (inferences, which are drawn by district court from

---

[3] Cooper has not appealed the district court's determination that Cooper's purchasing agents are not exempt from the Act's requirements, and Labor has not appealed the district court's decision not to prospectively enjoin Cooper's overtime and record keeping practices.

"evidentiary facts" and are material factors under Labor's regulations, should be left "undisturbed" by court of appeals unless "clearly wrong"). *See also Icicle Seafoods*, 475 U.S. at 713 ("facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed" under clearly erroneous standard); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1226 (5th Cir. 1990) (same). Such inferences include, for example, findings as to what work constitutes an employee's "primary duty" under 29 C.F.R. 541.214. *Dalheim*, 918 F.2d at 1226.

However, we exercise plenary review of the district court's construction of section 13(a)(1), and its ultimate determination that Cooper's inside salespersons are not exempt under the statute. *Icicle Seafoods*, 475 U.S. at 714; *Dalheim id.* To the extent Labor's regulations interpreting the exemption are at issue, we recognize that these constitute the agency's "body of experience and informed judgment" about the statute, and so, they should be given "considerable and in some cases decisive weight." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

We also understand that section 13(a)(1)'s exemptions from the Act's requirements are to be "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). The burden of proving these exemptions is upon the employer, and if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206 (1966).

B.

Of the various exemptions provided by section 13(a)(1) of the Act, only the "administrative" exemption is at issue here. The statutory exemption provides as follows:

> The provisions of section 206 [minimum wage requirements] . . . and section 27 [maximum hours and overtime requirements] shall not apply with respect to . . . any employee employed in a bona

fide . . . *administrative* . . . capacity . . . as . . . defined and delimited from time to time by regulations of the Secretary . . . .

29 U.S.C. 213(a)(1) (emphasis added).

Labor has issued agency regulations interpreting the exemption for administrative employees. These regulations outline both "long" and "short" tests of bona fide administrative employee status. *See* 29 C.F.R. § 541.2(a)-(e) ("long test"); 29 C.F.R. §§ 541.2(e)(2) and 541.214 ("short test").[4] As the parties agree, the two-prong "short test" applies here because Cooper's inside salespersons are high salaried employees who earn not less than $250 per week.

Under the applicable short test, an employee qualifes as a bona fide administrative employee if: (1) the employee's *"primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer* or the employers' customers"; *and* (2) "such primary duty includes work requiring the exercise of discretion and independent judgment." 29 C.F.R. § 541.214(a) (emphasis added). The district court concluded that the first requirement

---

[4] 29 C.F.R. § 541.2(e)(22) establishes the short test with a special proviso for high salaried employees. The test is articulated more fully at 29 C.F.R. § 541.214.

The Eighth Circuit Court of Appeals summarized the difference between the long and short tests as follows:

> The applicable regulation, 29 C.F.R. § 541.2(a)-(e), sets forth a [long] four-part test for an "employee employed in a bona fide . . . administrative . . . capacity" for employees, other than academic administrative personnel, who are compensated at a rate of not less than $155 per week, exclusive of board, lodging, or other facilities. However, a "streamlined" or "short" two-part test is applied to employees who are compensated at a rate of not less than $250 per week, exclusive of board, lodging, or other facilities . . . . Unlike the regular test of administrative capacity, the short test does not require the employee to "customarily and regularly" exercise discretion and independent judgment.

Donovan v. Tama Meat Packing Corp., 817 F.2d 54, 55 (8th Cir. 1987).

("first prong") of the short test is dispositive of the exemption issue with respect to Cooper's inside salesperson. We agree.[5]

> Labor's regulations appearing at 29 C.F.R. § 541.205(a)-(d) establish the meaning of the first prong of the short test. Subsection "a" of the regulation reads as follows:
>
> The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the *administrative operations of a business as distinguished from "production"* or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform *work of substantial importance to the management or operation of the business* of his employer or his employer's customers.

29 C.F.R. § 541.205(a) (emphasis added). Subsection "a" first establishes the analytical importance of an *administrative/productive work dichotomy* to be used when characterizing an employee's "primary duty" for purposes of first prong analysis. This dichotomy is not, however, relevant when the business under scrutiny is a retail or service establishment. *See* 29 C.F.R. § 541.205(a). then the appropriate classifying dichotomy is between "administrative" and "sales" work. *Id.* Since Cooper is a wholesale, the district court correctly chose to focus on the administrative/productive work dichotomy when it applied 29 C.F.R. § 541.205(a) to Cooper's inside salespersons.

Subsection "b" of the regulation explicates this dichotomy by fleshing out the character of "administrative" (as opposed to "productive") activity in a business:

> The administrative operations of the business include the work performed by so-called white-collar employees engaged in *"servicing" a business* as, for example, advising the management, planning, *negotiating*,

---

[5] Accordingly, we will not reach second prong analysis of this case.

> *representing the company, purchasing, promoting sales*, and business research and control. *An employee performing such work is engaged in activities relating to the administrative operations of the business* notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

29 C.F.R. § 541.205(b) (emphasis added). Thus, "servicing" an employer's business, such as by "negotiating", "representing", "purchasing" and promoting sales", is "administrative" activity.

Subsection "a" of the regulation establishes too that only persons who perform "*work of substantial importance to the management or operation of the busienss*" will satisfy the first prong of the short test. Subsection "c" of the regulation describes "work of substantial importance" as follows:

> As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those [whose] *work affects policy or whose responsibility it is to execute or carry it out*. The phrase also includes a wide variety of persons who either carry out *major assignments* in conducting the operations of the business or whose work *affects business operations to a substantial degree*, even though their assignments are tasks related to the operation of a particular segment of the business.

29 C.F.R. § 541.205(c) (emphasis added).

In summary then, the first prong of the short test of the administrative exemption asks ultimately whether an employee's primary work duty is "directly related to management policies or general business operations" of his employer. This ultimate question subsumes two other inquiries: (1) whether an employee

is a "production" rather than "administrative" worker within the meaning of the statute and 29 C.F.R. 541.205(a) & (c); and (2) whether an employee performs "work of substantial importance" to his employer by directly or indirectly formulating, affecting, executing or carrying out management policies by, for example, undertaking "major assignments" *or* performing work which "affects business operations to a substantial degree" within the meaning of 29 C.F.R. 541.205(a) & (b). These inquiries are fact intensive.[6]

C.

After trial, the district court made the following findings of fact:

> Inside salespersons at Cooper Electric work an average of forty-five hours per week. The majority of their time is spent in the office making telephone sales of electrical products, or in work closely related to selling electrical products. Sales are made primarily to contractors, industrial buyers, institutions, and government organizations. Only a small percentage of inside sales are made to individual consumers. Inside salespersons generate approximately $20 million dollars of Cooper Electric's gross annual sales.
>
> During the course of their employment, inside salespersons are paid a fixed salary plus incentive bonuses based on sales performance. These bonuses can increase an inside salesperson's annual compensation by $2000 to $5000. The sales incentive program is designed to reward the sales staff for attending educational programs, increasing the number of line items sold and maintaining high profit margins.
>
> Most of the goods sold by inside salespersons are from Cooper Electric's in-house inventory. Price quotations for these items are available through various trade publications, computerized price sheets, manufacturer's representatives, and an in-house computer which

---

[6] "It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. . . ." 29 C.F.R. § 541.205(c)(1).

> coordinates a pricing matrix based on the customer's record of purchases. Depending on the particular transaction, an inside salesperson may deviate either upward or downward from these price quotes, increasing or decreasing the company's margin of profit. When a particular item is not in stock, an inside salesman will call a manufacturer directly to purchase the product on special order. In that instance, the inside salesperson negotiates the cost to Cooper Electric with the manufacturer's representative and then negotiates the selling price to the customer requesting the goods.

App. 10-12.

Analyzing these historical facts under the first prong of the short test, the district court concluded that Cooper's inside salespersons do not satisfy either subpart of first prong analysis — to wit, they were not "administrative" employees and they do not perform "work of substantial importance" to their employer. The district court did not reach analysis under the short test's second prong which focuses on whether an employee's "primary duty includes work requiring the exercise of discretion and independent judgment." 29 C.F.R. § 541.214(a).

D.

We hold the district court did not err by concluding that Cooper's inside salespersons are production rather than administrative employees. The district court recognized appropriately that "it is important to consider the nature of the employer's business" when deciding whether an employee is an administrative or production worker. App. 17. Thus, the court took account of the parties' stipulations that Cooper's business "is the sale of electrical products" and its "primary business purpose . . . is to *produce sales* of electrical products." App. 17; 32-33. These stipulations reflect the underlying reality of wholesale sales enterprises like Cooper: they aim to *produce* wholesale sales. It follows that Cooper's inside salespersons may be classified as "production" rather than "administrative" employees for purposes of the short test and Labor's regulations at 29 C.F.R. § 541.205. *See similarly Dalheim*, 918 F.2d at 1228-33 (television newscast producers, station directors and assign-

ment reporters are non-exempt employees because their primary work duties are related to production aspect of television station's business); *Gusdonovich v. Business Information Co.*, 705 F.Supp. 262, 264-65 (W.D. Pa. 1985) (insurance claims investigator is not an administrative employee where employer's business purpose is " 'producing' information for its clients" and investigator's duties "consisted almost entirely of gathering that 'product' ").

The district court decided properly that "while [Cooper's inside salespersons'] efforts cannot be considered 'production' in the sense of manufacture of tangible goods, . . . these individuals play a substantial and integral role in defendant's ability to 'produce sales of electrical products' ". App. 18. Given "[t]he narrow scope of an inside salesperson[']s responsibility", the district court concluded that Cooper's inside salespersons "engage in activities relating to the day-to-day 'production' of sales within the plain meaning of the regulation rather than 'the administrative operation of a business' ". *Id.* This conclusion is not clearly erroneous.

> Contrary to Cooper's view, the concept of "production" in 29 C.F.R. § 541.205(a)'s administrative/productive work dichotomy is not to be understood as covering only work involving the manufacture of tangibles. The concept is not limited to manufacturing activities. Since Labor's regulations indicate that certain nonmanufacturing employees such as bank tellers, bookkeepers and clerks are not typically "administrative" employees for purposes of the statutory exemption, non-manufacturing employees may therefore be "production" workers for purposes of the dichotomy. *See* 29 C.F.R. 541.205(c)(1)-(3).

"Production" within the meaning of 29 C.F.R. § 541.205(a) may include wholesale sales work in the context of wholesale-distribution businesses like Cooper's. If Cooper's narrower construction of the term "production" were adopted, then all workers not actually engaged in tangibles *manufacture* would need to be classified as administrative employees. This narrow view of "production" under the regulation is at odds with the principle that exemptions from the Act's requirements are to be narrowly construed. We hold that inside sales persons like

Cooper's may be classified as "production" workers for purposes of Labor's regulations under section 13(a)(1) of the Act.

Focusing on the language at 29 C.F.R. § 541.205(b) which permits a finding of administrative work when an employee "services" his employer's business by, for example, representing, negotiating, purchasing, and promoting sales on his employer's behalf, the district court reasoned as follows:

> Defendant argues that inside salespersons participate in the administrative operations of the business because they "*represent* the company" to individuals seeking to *purchase* electrical supplies from Cooper Electric, occasionally "*promote sales*" by advising customers of additional products which may be a necessary or beneficial supplement to their existing orders, and "*negotiate*" on behalf of the company to make a sale to a particular customer . . . . *Admittedly, this characterization of an inside salesperson's responsibilities does meet the literal language of the interpretive regulations. However, these activities are part and parcel to the inside salespersons [sic] primary responsibility of producing sales; the impact on administrative operations of the business is minimal.*

App. 18-19 (emphasis added). The district court concluded that Cooper's inside salespersons "are not engaged in 'servicing' the business so as to participate in the administrative operations of Cooper Electric." App. 19. This determination is not clearly erroneous.

Cooper's inside salespersons do not "service" Cooper's business enough to justify a finding that they are administrative employees within the meaning of 29 C.F.R. § 541.205(a) & (b). Even though inside salesperson may sometimes "negotiate", "represent the company" and "purchase" on Cooper's behalf when customers request products not already in Cooper's stock-in-inventory, these are not their primary duties. The first-prong of the short test requires that an employee's *"primary duty"*

consist of administrative-type work. 29 C.F.R. § 541.214(a).[7] As the district court found, an inside salesperson's "primary responsibility" is to produce sales. It follows that negotiating product purchases from manufacturers is only intermittent, secondary employment responsibility for Cooper's inside salespersons. This does not make them "administrative" employees within the meaning of 29 C.F.R. § 541.205(a) & (b).

Likewise, the inside salespersons' primary duties of making routine wholesale sales are not administrative in nature just because their sales inevitably involve some price/terms negotiations with customers. This activity is not a "servicing" of Cooper's business. As the district court decided, these activities are "part and parcel" of the activity of "producing sales".

"Servicing" a business within the meaning of 29 C.F.R. § 541.205(b) denoted employment activity *ancillary* to an employer's principal production activity, whether that be production of a "commodity or commodities, . . . goods or services", *see Dalheim*, 918 F.2d at 1230, or as in the case here, production of wholesale sales. It follows that inside salespersons do not "service" Cooper's business by making wholesale sales — wholesale sales *is* Cooper's business. Any negotiation and representational duties undertaken by Cooper's inside salespersons in the course of ordinary selling do not constitute administrative-type "servicing" of Cooper's wholesale business within the meaning of 29 C.F.R. § 541.205(b). These activities are only routine aspects of sales *production* within the context of Cooper's operation.

Furthermore, Cooper's inside salespeople do not primarily undertake administrative-type work of 'sales promotion' within the meaning of 29 C.F.R. § 541.105(b). Under that regulation, "promoting sales" means something more than routing selling efforts focused simply on particular sales transactions. Sales promotion (as an example of "servicing" under 29 C.F.R. § 541.205(b)), consists of marketing activity aimed at promoting (i.e., increasing, developing, facilitating and/or maintaining)

---

[7] See *also* C.F.R. § 541.206(a) which says, "[t]he definition of 'administrative' exempts *only* employees who are *primarily engaged* in the responsible work which is characteristic of employment in a bona fide administrative capacity". (Emphasis added.)

customer sales *generally*. "Promoting sales" does not encompass activities necessarily included in the process of closing specific sales.

Accordingly, the district court was not clearly wrong when it rejected Cooper's argument that its inside salespersons are administrative employees who "promote sales". Inside salespersons at Cooper make discrete sales; they are not promoters or marketeers. Even if, as Cooper argues,[8] they "occasionally . . . advis[e] customers of additional products which may be a *necessary supplement to their existing orders*, and 'negotiate' on behalf of the company to make a sale to a *particular* customer" App. 18 (emphasis added), such selling efforts in the context of discrete, particularized sales transactions do not constitute "administrative" work within the meaning of section 13(a)(1) of the Act.

E.

As for the first-prong's other requirements that employees perform "work of substantial importance to the management or operation" of an employer's business within the meaning of Labor's regulations at 29 C.F.R. § 541.205(a) & (c), the district court said:

> It is axiomatic that a salesperson 'performs work of substantial importance' to any sales-oriented business. Because of the large volume of sales generated by inside salespersons, it is clear that these individuals are important to the success of Cooper Electric. However, *to suggest that in making these sales, an inside salesperson is carrying out major assignments is to strain the interpretation of the regulation beyond common sense . . . . [T]he nature of an inside salespersons [sic] work is to produce sales for Cooper Electric, not to develop or implement specific work assignments consistent with an overall company policy*. There is no evidence in the record to suggest

---

[8] Contrary to Cooper's assertion on appeal, the district court did not find that inside salespersons "promote sales" within the meaning of § 541.205(b) — that is only the "characterization" of these employees that Cooper advanced to the district court. *See* App. 18-19

> that inside salespersons are formally assigned to particular customer accounts . . . . *To conclude that this interpretive regulation [§ 541.205(c)] was intended to include inside salespersons would unreasonably extend the application of an otherwise unambiguous provision.*

App. 19-20 (emphasis added). With this the district court decided that Cooper's inside salespersons do not perform work of substantial importance to the management or operation of Cooper's business.

Though the court found explicitly that Cooper's inside salespersons do not carry out "major assignments", it did not say their work "affects [Cooper's] business operations to a substantial degree" within the meaning of 29 C.F.R. § 541.205(c). Nevertheless, the court indirectly spoke to the latter point by saying inside salespersons "[do] not . . . develop or implement specific work assignments consistent with an overall company policy." App. 19.

Cooper and *amici* contend inside salespeople are administrative employees who "affect" Cooper's business operations "to a substantial degree", because on the one hand the inside salespeople make important financial contributions to Coopers' business; and on the other, these salespeople have skills and knowledge that are essential to Cooper's wholesale enterprise.

We hold as a matter of law that Cooper's inside salespersons do not perform "work of substantial importance to the management or operation" of Cooper's business within the meaning of 29 C.F.R. § 541.205(a) and (c). The district court decided correctly that inside salespersons do not undertake "major assignments" within the meaning of 29 C.F.R. § 541.205(c). The record suggests these salespersons are not more than routine functionaries, albeit important employees.

Also, Cooper's inside salespersons do not "affect[] [Cooper's] business operations to a substantial degree" within the meaning of 29 C.F.R. § 541.205(c). We read that requirement of the regulation as meaning that only employees whose work substantially affects the *structure* of an employers' business operations

and management policies may be characterized as administrative workers. We conclude the district court's finding that "the nature of an inside salespersons [sic] work is to produce sales for Cooper Electric, *not to develop or implement specific work assignments consistent with an overall company policy*," is not clearly erroneous, and it supports the legal conclusion that inside salespersons do *not* "affect" Cooper's business operations "to a substantial degree" within the meaning of 29 C.F. R. § 541.205(c). The factual finding and the record as a whole indicates Cooper's inside salespersons are not involved directly or indirectly in the determination, administration or implementation of Cooper's management or operational policies.

We reject *amici's* argument that inside salespersons affect Cooper's business operations to a substantial degree simply because their collective efforts account for so much of Coopers' annual sales.[9] The financial effect of employee activity cannot alone show "work of substantial importance to the management or operation" of an employer's business within the meaning of 29 C.F.R. § 541.205(a) & (c). Otherwise, any subset of employees whose work *as a group* determines an enterprise's financial health might qualify as "administrative" employees within the meaning of these regulations, no matter how insignificant any one employee's role is to the enterprise. Such a result is inconsistent with section 13(a)(1) of the Act and 29 C.F.R. § 541.205(c) *See Dalheim*, 918 F.2d at 1231 ("that a worker's poor performance may have a significant profit-and-loss impact is not enough to make that worker an exempt administrator").

Labor's regulation at § 541.205(c)(2) clearly indicates that an employee does not perform administrative work of substantial importance just because his employer will experience financial losses if the employee fails to perform his job properly. Also, whether inside salespersons perform work of substantial importance to the management or operation of Cooper's business must be addressed in terms of the consequences of each employee's efforts alone, not the effect of the salespeople as a group. 29 C.F.R. § 541.205(c)(6).

---

[9] The district court found that sales by inside salespersons account for approximately $20 million of Coopers' gross annual sales of approximately $35 million. App. 18.

We also reject Cooper's argument on appeal that the job-related skill and knowledge of Coopers' inside salespersons justify a conclusion that their work substantially affects Coopers' business operations. Such expertise is inevitably developed and applied by the salespeople in the course of making routine sales; the record indicates inside salespeople do not apply their skill and knowledge so as to affect the structure of Coopers' management policies or operations.

In summary, we find no error in the district court's reasoning and judgment that Cooper's inside salespersons fail to qualify for section 13(a)(1)'s administrative exemption from the Act's overtime requirements because these employees do not satisfy the first prong of the short test.[10] We must, however, reverse the lower court's refusal to award liquidated damages.

III. MANDATORY LIQUIDATED DAMAGES UNDER SECTION 16(b)

A.

When an employer violated the overtime wage provisions of section 207 of the Act, section 216(b) provides for payment of both unpaid wages and an equivalent amount of *mandatory* liquidated damages.

> Any employer who violates the provisions of. . . . section 207 . . . *shall be liable* to the employee or employees affected in the amount of . . . their unpaid overtime compensation, . . . *and in an additional equal amount as liquidated damages* . . . .

29 U.S.C. § 216(b) (emphasis added) "Under the Act, liquidated damages are compensatory, not punitive in nature. Congress provided for liquidated damages to compensate employees for

[10] To qualify under the short test, first and second prong requirements must both be met. Coopers' arguments on appeal which rest on Labor's regulations addressing the *second* prong of the short test of 29 C.F.R. § 541.214 are unavailing because its inside salespersons do not satisfy first prong requirements. First and second prong requirements are analytically distinct, even if the same underlying factual determinations are material to both. The first prong asks whether an employee's primary work is related to management policies or generally business operations, whereas the second focuses on the degree of discretion and independent judgment exercised by an employee.

losses they might suffer by reason of not receiving their lawful wage at the time it was due." *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982).

Despite the mandatory language of the Act, Congress has provided courts with some discretion to limit or not award liquidated damages. Section 11 of the Portal-to-Portal Act provides:

> In any action . . . to recover . . . unpaid overtime compensation, or liquidated damages, under the [FLSA] . . . if the employer shows . . . the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S.C. 216].

29 U.S.C. § 260. We have stressed that employers must show good faith and reasonable grounds before a court may exercise "sound discretion" to deny or limit liquidated damages.

> [The Portal-to-Portal Act] provides that the district court has discretion to award no liquidated damages, or to award an amount of liquidated damages less than the amount provided by section 216(b) of the FLSA, *if, and only if,* the employer shows that he acted in good faith and that he had reasonable grounds for believing that he was not violating the Act.

Brunner, 668 F.2d at 752 (emphasis in original). Furthermore, before a district court exercises discretion it *"must make findings* . . . that the employer acted in good faith and with reasonable grounds." *Willimas v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984) (emphasis added, quoting from *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1149 (3d Cir. 1983)). Simply quoting from the provisions of the Act is not enough. *Claridge Hotel and Casino*, 846 F.2d at 187-88.

We have also said a defendant employer bears the "plain and substantial" burden of proving he is entitled to discretionary

relief from the FLSA's mandatory liquidated damages provision. *Tri-County Growers, Inc.*, 747 F.2d at 128-29. An employer must prove,

> that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict. . . .
>
> The *good faith requirement is a subjective one* that "requires that the employer have an honest intention to ascertain and follow the dictates of the Act." . . . The *reasonableness requirement imposes an objective standard* by which to judge the employers' conduct . . . Ignorance alone will not exonerate the employer under the objective reasonableness test. . . .
>
> If the employer fails to come forward with plain and substantial evidence to satisfy the good faith and reasonableness requirements, the district court is without discretion to deny liquidated damages.

Id. at 129 (citations omitted). *See similarly Claridge Hotel and Casino*, 846 F.2d at 187.

To carry his burden, a defendant employer must show that he took affirmative steps to ascertain the Act's requirements, but nonetheless, violated its provisions.

> The fact that an employer has broken the law for a long time without complaints from employees does not demonstrate the requisite good faith required by the statute. Moreover, the employee need not establish an intentional violation of the Act to recover liquidated damages. Instead, the employer must affirmatively establish that he acted in good faith by attempting to ascertain the Acts' requirements.

Tri-County Growers, Inc., 747 F.2d at 129 (citation omitted). A defendant employer's burden of proof is "a difficult one to meet", *Brock v. Wilamowsky* 833 F.2d 11, 19 (2d Cir. 1987). "Double damages are the norm, single damages the exception. . . . " *Walton v. Untied (sic) Consumers Club, Inc.*, 786 F.2d 303, 310

(7th Cir. 1986).

B.

Assuming a district court has first properly made the required preliminary findings of an employer's subjective good faith and objectively reasonable grounds for violating the Act, we will review its exercise of "substantial discretion" to deny or limit an award of liquidated damages only for abuse of discretion. Furthermore, while we must apply the clearly erroneous standard of Fed. R. Civ. P. 52(a) when reviewing both the district court's historical findings of fact which underlie its "good faith" and "reasonableness" determinations, *Icicle Seafoods*, 475 U.S. at 714, and the finding of subjective good faith itself, we exercise plenary review of the district court's legal conclusion that Cooper had "reasonable grounds for believing" that its violative conduct was not a violation of the FLSA.[11]

Thus, we must decide first whether the district court erred by finding that Cooper violated the FLSA's overtime provisions in reasonable good faith. Only if the district court did not err making this preliminary determination, will we review with deference its refusal to award liquidated damages.

C.

We hold that the district court erred as a matter of law by concluding that Cooper violated FLSA overtime requirements in *reasonable* good faith. Cooper failed to take affirmative steps to ascertain the Act's requirements before the onset of Labor's Wage and Hour Investigation, and this failure precludes a finding

---

[11] To the extent we said in *Tri-County Growers, Inc.*, 747 F.2d at 129, n. 15, that "[t]he determination of good faith and reasonableness is one of ultimate fact" which is reviewed for legal error, we were wrong since the Supreme Court has held that Rule 52(a) "does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

However, the clearly erroneous standard of Rule 52(a) "does not apply to conclusions of law." *Id.* A finding under section 11 of the Portal-to-Portal Act that an employer "had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]", 29 U.S.C. § 260, is a legal conclusion based on historical facts and judicial interpretations of the statute itself. Accordingly, such a legal conclusion is subject to plenary review.

of reasonable good faith. Accordingly, we must remand for an award of liquidated damages equivalent to Cooper's employees' unpaid overtime wages, and will vacate the district court's award of prejudgment interest.

The district court reasoned that although Cooper did not attempt to ascertain the Act's overtime pay requirements, it violated the Act reasonably and in good faith because the company's illegal pay practices conformed to industry customs, and there was no evidence Cooper willfully violated the Act. The district court said:

> [Cooper] acted in good faith and had reasonable grounds for believing that the subject employees were exempt from the overtime and record keeping provisions of the Act. It is true, as [Labor] notes, that prior to the Wage and Hour Investigation conducted by the Department of Labor, [Cooper] *did not do any analysis or conduct any inquiry to determine whether the subject employees qualified for an exemption.* Instead, since the inception of its business in 1961, defendant followed the well-established and widely accepted industry practice of compensating these employees on the basis of salary plus bonus where appropriate. The testimony is uncontroverted in this regard. Reliance on such an industry standard is reasonable and necessary if a company is to remain competitive in the market for qualified employees. [Cooper] cannot be faulted for its admitted lack of diligence in determining the applicability of the Act's requirements as to these employees.
>
> Moreover, there is no evidence in the record to suggest that [Cooper] knowingly and willfully intended to avoid compliance with the requirements of the Act. In fact, the evidence indicates that as soon as actual non-compliance was brought to the attention of the defendant, the company voluntarily changed the pay structure for computer operators, assistant warehouse managers and purchasing agents. This voluntary compliance clearly is indicative of defendant's good faith. Finally, defendant's refusal to alter the compen-

> sation package for inside salespersons was based on a legitimate, good faith dispute as to whether these employees did, in fact, qualify for an exemption from the requirements of the Act. Indeed, the litigation of this case and the close factual determinations necessary for its ultimate resolution give credence to the reasonableness and good faith of the defendants actions. The record is clear that the defendant employer did not callously disregard its responsibility. Accordingly, the Court concludes that an award of liquidated damages is not appropriate in this case.

App. 23-25 (emphasis added).

We have quoted at length because we will discuss why the district court's reasoning does not support its findings of reasonable, good faith violations. First, that Cooper "did not do any analysis or conduct any inquiry to determine whether [its] ... employees qualified for an exemption" and it "admitted [a] lack of diligence in determining the applicability of the Act's requirements", are dispositive of the liquidated damages issue. These facts are not clearly erroneous and upset the district court's legal conclusion that Cooper violated the Act in reasonable good faith. An employer "must affirmatively establish that he acted in good faith by attempting to ascertain the Act's requirements." *Tri-County Growers, Inc.* 747 F.2d at 129. Cooper's failure to inquire into the Act's overtime pay requirements before Labor's Wage and Hour Investigation precludes a determination that the company's subjective good faith was reasonable. Accordingly, the district court's reasonableness finding was legal error, and that alone requires reversal and remand.

Second, the district court's finding that "there is no evidence in the record to suggest that [Cooper] knowingly and willfully intended to avoid compliance with the Act" is not by itself enough to support the finding of reasonable good faith. A showing that an employer "did not intentionally violate the Act" falls short of satisfying objective component of the good faith requirement. *Tri-County Growers, Inc.*, 747 F.2d at 129.

Third, the district court's factual finding that Cooper "voluntarily changed the pay structure" for some but not all of

its affected employees *after* Labor initiated its investigation is irrelevant to good faith analysis.[12] Section 11 of the Portal-to-Portal Act requires *retrospective* analysis of an employer's conduct with respect to violations of the FLSA, not appraisal of an employer's post-violation conduct. Since Cooper's illegal wage payment practices preceded Labor's investigation, its response to the investigation may show good judgment but does not establish a good faith violation.

Fourth, that Cooper's violations conformed to "well-established and widely accepted industry practice" is not ground for finding a reasonable good faith violation of the Act. In lieu of any affirmative attempt by an employer to determine the legality of its wage payment practices, the employer's adherence to customary and widespread industry practices that violate the Act's overtime pay provisions is not evidence of an objectively reasonable good faith violation. *Wilamowsky*, 833 F.2d at 19-20. *See similarly Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 465 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) ("That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks."); *Tri-County Growers, Inc.*, 747 F.2d at 129 ("fact that an employer has broken the law for a long time without complaints from employees does not demonstrate the requisite good faith required by the statute").

The district court's good faith theory that Cooper's violative pay practices were "reasonable and necessary" competitive responses to the "market for qualified employees", App. 23, is also mistaken. This reasoning tends improperly to favor companies in industries where economic conditions make violations of the Act most attractive or pervasive. *See similarly Glenn v. General Motors Corp.*, 841 F.2d 1567, 1573 (11th Cir.), *cert. denied*, (1988) (in context of liquidated damages award arising under Equal Pay Act, court rejects discredited argument that market forces led defendant-employer to reasonable belief that discriminatory pay practices were in conformity with law).

---

[12] Cooper remained unwilling to pay overtime to its inside salespersons even after Labor initiated the investigation that put Cooper on actual notice of the Act's overtime pay requirements.

Finally, the circumstances here do not support the district court's conclusion that Cooper's violation resulted from a "legitimate, good faith dispute as to whether [inside salespersons] ... did, in fact, qualify for an exemption from the requirements of the Act." While we have considered the closeness of factual or legal questions in a case arising under the Act to be relevant to a liquidated damages decision, *see Claridge Hotel and Casino*, 846 F.2d at 187, we hold here that in order to assist an employer's case against liquidated damages, "legal uncertainty ... must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice". *Laffey*, 567 F.2d at 466. Legal uncertainty must have actually led the employer who violated the Act to believe that it was in compliance at the time of the violation. Here there is no record evidence that Cooper undertook its illegal pay practices reasonably believing them to be legal because of some pervasive legal uncertainty concerning the exemption status of its employees. The legality of its pay practices was never an issue for Cooper until Labor began its Wage and Hour Investigation.

We conclude that the district court had no discretion to deny liquidated damages for these employees because, first and foremost, Cooper had not demonstrated that it took affirmative steps to ascertain the legality of its pay practices before Labor's investigation. Accordingly, we will remand for an order awarding mandatory liquidated damages.

The purpose of an award of liquidated damages under section 16(b) of the Act, 29 U.S.C. § 216(b), is to compensate employees for any losses caused by delayed receipt of overtime wages they are due. *Brunner*, 668 F.2d at 753. Since prejudgment interest serves the same purpose, [13] we will vacate that part of the district court's order.

---

[13] "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987).

IV.

In summary, we will affirm the district court's judgment that Cooper violated the Act as charged. We will, however, vacate the lower court's award of prejudgment interest and remand for an award of liquidated damages.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B:

Opinion and Order of the United States District Court for the District of New Jersey dated May 17, 1990 and amendment thereto dated May 22, 1990 with Judgment of Court dated June 19, 1990.

HON. NICHOLAS H. POLITAN
Civil Action File No. 87-CV-2568

Louis DeBernardo, Esq.
U.S. Department of Labor
201 Varick Street, Room 707
New York, New York 10014
Tel. 212-337-2083
LdB (7325)

SOL:LBD:gr

FILED
JUN 26 1990
AT 8:30_____M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

COOPER ELECTRIC SUPPLY CO., INC.
and RICHARD A. COOPER,
Defendants.

Civil Action
No. 87-2568
(POLITAN, J.)

JUDGMENT

This Court in its Opinion and Order dated May 17, 1990 found that the defendants violated the overtime and record keeping of Sections 7 and 11(c) of the Fair Labor Standards Act of 1938, as amended. 29 U.S.C. Section 201 *et seq.*, hereinafter called the Act.

Pursuant to its Opinion and Order, the Court finds that overtime compensation is due employees in the amount of Seventy-four Thousand One Hundred Forty-four Dollars and Fifty-One Cents ($74,144.51) as stipulated by defendant according to Schedule A, attached hereto and made a part hereof.

Further, The Court finds that the amount of pre-judgment interest due employees is computed at the underpayment rate established by the Secretary of Treasury pursuant to 26 U.S.C. §6621 is Twenty-Six Thousand Two Hundred Ninety-One Dollars Sixty-Four Cents ($26,291.64) as set forth in Schedule A attached hereto.

It is therefore for cause shown:

I. ORDERED, ADJUDGED, AND DECREED that the defendants are ordered to pay to plaintiff overtime compensation and pre-judgment interest in the total amount of One Hundred Thousand Four Hundred Thirty-Six Dollars Fifteen Cents ($100,436.15) to the employees listed in Schedule A, and are directed to make payment of the said compensation no later than July 16, 1990.

II. It is further ORDERED, ADJUDGED, AND DECREED that the provisions of this order relative to backwage payments shall be deemed satisfied when defendants delivers to plaintiff's representatives U.S. Department of Labor, Wage and Hour Division, Northern New Jersey District Office, located at 200 Scheffield Street, Suite 102, Mountainside, New Jersey 07092, checks in the gross amount of One Hundred Thousand Four Hundred Thirty-Six Dollars Fifteen Cents ($100,436.15) less legal deductions, made payable in the alternative to each individual employees listed in Schedule A or "Wage-Hour, Labor." Neither defendants nor any one on their behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid as backwages under this Judgment. Plaintiff shall distribute the proceeds of such checks to the employees involved, or to their estates, if that is necessary, and any sums not distributed to the employees named herein, or to their personal representatives because of inability to locate the proper persons or because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §§2041 and 2042.

III. ORDERED, ADJUDGED, AND DECREED and that in the event full payment of the overtime compensation and pre-judgment interest as specified in attached Schedule A is not submitted by the defendants to the plaintiff by July 16, 1990 then post judgment interest will begin to accrue on the unpaid balance at the interest rate established pursuant to 28 U.S.C. §1961(a).

IV. ORDERED, ADJUDGED, AND DECREED that plaintiff's demand for injunctive relief is denied, and in the event

defendants do not alter their pay and record keeping practices to comply with the overtime and record keeping provisions of Sections 7 and 11(c) of the Act, plaintiff may make an application to the Court on short notice to request injunctive relief.

DATED: June 19, 1990
Newark, New Jersey

/s/ NICHOLAS H. POLITAN

NICHOLAS H. POLITAN
United States District Judge

SCHEDULE A

COOPER ELECTRIC SUPPLY CO., INC.
Total Compensation Due as of May 17, 1990
(Ordered By Employee Name)

Employee Name	Total Back Wages Due	Prejudgement Interest to 05/17/90	Total Compensation Due
ANTRIM, WALTER	$843.10	$494.25	$1,337,35
BEIRNE, HARRY	$7,924.03	$2,788.84	$10,712.87
BRADY, LOUIS	$386.92	$245.22	$632.14
DALY, JAMES	$3,026.02	$527.88	$3,553.90
DELORENZO, SAL	$738.95	$409.65	$1,148.60
DERCOLE (BUONVINO), MARY	$488.08	$243.45	$731.53
FERRARI, EDWARD	$1,494.55	$752.16	$2,246.71
GALLAGHER, ROBERT	$426.46	$149.52	$575.98
GONZALEZ, MIGUEL	$310.16	$197.66	$507.82
GRAY, RICHARD	$532.10	$323.72	$855.82
GREEN, JAKE	$1,271.20	$648.66	$1,919.86
KANE, CAROL	$1,962.20	$1,019.18	$2,981.38
MALIZIA, FRED	$407.68	$154.20	$561.88
MANZO, CHRISTOPHER	$5,131.25	$1,350.11	$6,481.36
MEYERS, KIMBERLY	$241.08	$118.47	$359.55
MEYERS, SUSAN	$183.68	$92.59	$276.27
MONTGOMERY, RANDY	$7,865.89	$2,760.50	$10,626.39
NIENHOUSE, PATRICIA	$1,726.14	$773.69	$2,499.83
OATES, EDDIE	$2,845.90	$998.76	$3,844.66
REGENYE, CHARLES	$5,966.44	$2,434.76	$8,401.20
SCHMIDT, WILLIAM	$224.00	$60.46	$284.46
SMITH, WILLIAM	$2,752.45	$1,478.03	$4,230.48
SOBECK, ROGER	$4,564.95	$1,346.80	$5,911.75
STREITER, BRIAN	$4,842.72	$1,475.32	$6,318.04
SYDLO, JAMES	$805.97	$401.98	$1,207.95
TIMMONS, JIMMY	$2,200.21	$397.09	$2,597.30
TOUHEY, PATRICK	$9,081.09	$3,186.97	$12,268.06
VAURA, JAMES	$4,235.61	$1,038.78	$5,274.39
WESTBROOK, STEPHEN	$1,083.28	$133.65	$1,216.93
WYSOCKI, ANDREW	$582.40	$289.29	$871.68
Grand Totals:	$74,144.51	$26,291,64	$100,436.15

FILED
MAY 17 1990
AT 8:30_____A.M.
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ELIZABETH DOLE, Secretary of Labor, United States Department,
Plaintiff,
v.
COOPER ELECTRIC SUPPLY CO., INC. and RICHARD A. COOPER,
Defendants.

Civil Action
No. 87-2568
HON.
NICHOLAS H. POLITAN

OPINION
AND
ORDER

POLITAN, District Judge

APPEARANCES:

Louis De Bernardo, Esq.
Evan Barouh, Esq.
U. S. DEPARTMENT OF LABOR
201 Varick Street
Room 707
New York, NY 10014
Attorneys for Plaintiff

Russell M. Woods, Esq.
Martin K. Indik, Esq.
WOODS & TREMBULAK
11 Commerce Drive
Cranford, NJ 07016
Attorneys for Defendants

The Secretary of Labor filed this action on July 2, 1987 alleging that defendants have, since at least June 10, 1985, violated the overtime and record keeping provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA" or "the Act"). Plaintiff's Complaint seeks: (1) to restrain defendants from

withholding any unpaid overtime compensation found due from July 2, 1987 through the entry of judgment or compliance with the Act; (2) an award of liquidated damages in an amount equal to the unpaid compensation; and, (3) to prospectively enjoin the defendants from violating the provisions of the FLSA. This Opinion and Order is rendered pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and constitutes this Court's Findings of Fact and Conclusions of Law.

Defendant Cooper Electric Supply Co., Inc. ("Cooper Electric") is a corporation organized under the laws of the State of New Jersey, having its principal place of business at 666 Highway #35, Middletown, New Jersey. Cooper Electric also conducts business at two branch offices located at 320 Ninth Avenue, Paterson, New Jersey, and 1080 Edward Street, Linden, New Jersey. The company's primary business at each of these three locations is the sale of electrical products; combined annual sales total approximately $35 million. To staff its operations, the company employs approximately 120 employees, including inside salespersons, counter salespersons, outside salespersons, purchasing agents and various clerical employees handling payroll, receivables and credit.

Inside salespersons at Cooper Electric work an average of forty-five hours per week.[1] The majority of their time is spent in the office making telephone sales of electrical products, or in work closely related to selling electrical products. Sales are made primarily to contractors, industrial buyers, institutions, and government organizations. Only a small percentage of inside sales are made to individual consumers. Inside salespersons generate approximately $20 million dollars of Cooper Electric's gross annual sales.

During the course of their employment, inside salespersons are paid a fixed salary[2] plus incentive bonuses based on sales

---

[1] While these employees did not record the precise number of hours worked in any given week, the parties have stipulated that an inside salesperson works an average of forty-five hours per week.

[2] In this regard, inside salespersons are distinguished from counter salespersons who are paid on a hourly basis. The Court notes that counter salespersons are not exempt from the record keeping and overtime provisions of the FLSA.

performance. These bonuses can increase an inside salesperson's annual compensation by $2000 to $5000. The sales incentive program is designed to reward the sales staff for attending educational programs, increasing the number of line items sold and maintaining high profit margins.

Most of the goods sold by inside salespersons are from Cooper Electric's in-house inventory. Price quotations for these items are available through various trade publications, computerized price sheets, manufacturer's representatives, and an in-house computer which coordinates a pricing matrix based on the customer's record of purchases. Depending on the particular transaction, an inside salesperson may deviate either upward or downward from these price quotes, increasing or decreasing the company's margin of profit. When a particular item is not in stock, an inside salesman will call a manufacturer directly to purchase the product on special order. In that instance, the inside salesperson negotiates the cost to Cooper Electric with the manufacturer's representative and then negotiates the selling price to the customer requesting the goods.

During trial, plaintiff introduced extensive testimony in an attempt to establish a company-wide policy requiring that all sales at "cost plus 10 per cent" or lower be approved by a sales manager. It is clear to this Court from a review of the record, however, that such policy is not implemented or enforced in any consistent or regular manner at any of the three Cooper locations. The company does, however, compile a daily list of sales with profit margins below cost plus 17 per cent. This price exception report is utilized by management to monitor sales activity as well as evaluate a particular inside salesperson's performance.

A purchasing agent for Cooper Electric is responsible for maintaining the stock of goods available for sale at a particular location. Stock for a particular item is replenished within a range of minimum and maximum levels established by monthly sales reports.[3] Any amount above the maximum for a particular item

---

[3] During the period relevant to this action, a purchasing agent relied on a "boogey book" which contained the appropriate minimum and maximum levels for each item in inventory. The "boogey book" is no longer used because all information regarding inventory is available by computer.

is returned to the manufacturer. The purchasing agent is required simply to count the number of items in stock for a particular product and order or return the amount necessary to maintain a level close to the prescribed maximum. The purchasing agent rarely negotiates the price paid for a particular item ordered and must obtain management's approval to purchase an item that has substantially increased in price. In addition to these responsibilities, the purchasing agent may also, at the request of an inside salesperson, call manufacturers and request price information for a special order.

The primary issue before the Court in this case is whether Cooper Electric's inside salespersons and purchasing agents[4] qualify as "*bona fide* administrative employees" eligible for the statutory exemption from the overtime and record keeping provisions of the FLSA.[5] In general, exemptions from the provisions of the Act are to be narrowly construed against the employer. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1143 (3d Cir. 1983). In addition, the employer bears the burden of proof to establish the exemption for each individual employee. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Idaho Sheetmetal Works, Inc. v. Wirth*, 383 U.S. 190 (1966); *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 501 (N.D. Tex. 1988). The Court notes that there is no express exemption under § 13(a)(1) of the Act which applies specifically to inside salespersons or purchasing agents. Resolution of this matter, therefore, rests primarily on factual determinations regarding the nature of the particular employee's work and focuses on whether the work

---

[4] Plaintiff's claim regarding purchasing agents is limited to that period during which these employees earned a fixed salary, and did not record hours worked. At some time after the commencement of the Department of Labor's investigation, purchasing agents were paid on an hourly basis consistent with the record keeping and overtime provisions of the Act.

[5] Plaintiff's Complaint also includes allegations regarding the status of assistant warehouse managers and computer operators at Cooper Electric. The parties have stipulated in the Final Pre-trial Order that these two classes of employees are not exempt from the record keeping and overtime provisions of the Act. This Court accepts the parties' stipulation and finds that an award of back pay for these two classes of employees is appropriate.

performed is characterized as "production" or as "general business operations".

An exemption from the provisions of the FLSA is available for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . . ." 28 U.S.C. § 213(a)(1).[6] Under the general and interpretive regulations which apply to § 213(a)(1), *see* 29 C.F.R. §§ 541.0 *et seq.*, the Secretary has outlined two separate standards to determine whether a particular employee works in an administrative capacity: the "long test", *see* 29 C.F.R. § 541.2(a-e), and the "short test", *see* 29 C.F.R. § 541.214. In this case, the parties have agreed that the "short test", a special proviso for high salaried administrative employees who receive compensation of

---

[6] The Final Pretrial Order in this case, filed December 9, 1988, lists as a legal issue: "Whether defendant's employees employed at defendant's three locations in the job categories of inside salesperson, and purchasing agent are properly exempt as employees employed in a bona fide administrative or bona fide executive capacity pursuant to each of the criteria set forth in 29 C.F.R. 541.1 and 29 C.F.R. 541.2." In the post trial submissions to the Court, both plaintiff and defendant have not addressed the argument that the disputed employees work in a "bona fide executive capacity". The Court finds no evidence in the record to support the conclusion that inside salespersons or purchasing agents are employed by the defendant in a "bona fide executive capacity" so as to qualify for an exemption. Accordingly, the Court will address only the remaining argument advanced by counsel regarding employment in a "bona fide administrative capacity".

Though neither party raised it in their post-trial submissions, the Court considers briefly the exemption provided for "outside salesmen." Under the regulatory interpretations, an outside salesmen is a person "who is customarily and regularly engaged away from his employer's place or places of business." 29 C.F.R. § 541.5. The regulations provide that the phrase "away from his employer's place of business",

> is based on the obvious connotation of the word "outside" in the term "outside salesmen". It would obviously lie beyond the scope of the Administrator's authority that "outside salesman" should be construed to include inside salesmen. *Inside sales and other inside work (except such as is directly in conjunction with and incidental to outside sales and solicitations, as explained in paragraph (b) of this section) is non-exempt.*

29 C.F.R. § 541.502 (emphasis added).

This reference to inside salesmen, although not in the context of a provision directly applicable to that class of employee, suggests that the Administration distinguishes between inside salespersons and outside salespersons, intending that the former be a non-exempt position.

not less than $250 per week, applies to Cooper Electric's inside salespersons and purchasing agents.

Under the "short test", an employee qualifies for an exemption from the provisions of the FLSA if: (1) his or her primary duty consists of "the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers"; and, (2) "the performance of such primary duty includes work requiring the exercise of discretion and independent judgment". 29 C.F.R. § 541.214(a).

The interpretive regulations define work "directly related to management policies or general business operations" as

> those types of activities relating the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.
>
> The administrative operations of the business include the work performed by so-called white-collar employees engaging in "servicing" a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.

29 C.F.R. § 541.205(a) & (b).

Regarding the second prong of the short test, the interpretive regulations define "work requiring the exercise of discretion and independent judgment" as involving

> the comparison and the evaluation of possible courses of conduct and acting or making the decision after the various possibilities have been considered. The term . . . implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect

> to matters of significance.
>
> * * * *
>
> The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. . . .

29 C.F.R. § 541.207(a) & (b).

The regulations also state that discretion and independent judgment "may include the kind of discretion and judgment exercised by buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers." 29 C.F.R. § 541.207(d)(2). It should be noted that the Regulations expressly distinguish between the exercise of discretion and "the use of skill in applying techniques, procedures, or specific standards." 29 C.F.R. § 541.207(b)(1). An employee

> who merely applies his knowledge in following prescribed procedures or determining which procedures to follow, or who determines whether specific standards are met. . . is not exercising discretion and independent judgment within the meaning of § 541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

29 C.F.R. § 541.207 (c)(1).

In applying the first prong of the "short test" to determine whether an inside salesperson performs work "directly related to management policies or general business operations", it is important to consider the nature of the employer's business itself. The parties have stipulated that "the primary business purpose of the defendant corporation is to produce sales of electrical products." Defendant has been very successful in achieving that purpose, with gross annual sales of approximately $ 35 million. The efforts of inside salespersons contribute approximately $ 20 million to annual gross sales. While their efforts cannot be considered "production" in the sense of manufacture of tangible goods, it can not be disputed that these individuals play a substantial and integral role in defendant's ability to "produce

sales of electrical products". In fact, inside salespersons spend nearly all their time on the telephone receiving orders from customers seeking to purchase electrical supplies. The narrow scope of an inside salespersons responsibility compels this Court to conclude that they engage in activities relating to the day-to-day "production" of sales within the plain meaning of the regulation rather than "the administrative operations of a business".

Defendant argues that inside salespersons participate in the administrative operations of the business because they "represent the company" to individuals seeking to purchase electrical supplies from Cooper Electric, occasionally "promote sales" by advising customers of additional products which may be a necessary or beneficial supplement to their existing orders, and "negotiate" on behalf of the company to make a sale to a particular customer. *See* 29 C.F.R. § 541.205(a)&(b). Admittedly, this characterization of an inside salesperson's responsibilities does meet the literal language of the interpretive regulations. However, these activities are part and parcel to the inside salespersons primary responsibility of producing sales; the impact on administrative operations of the business is minimal. Accordingly, the Court concludes that inside salespersons are not engaged in "servicing" the business so as to participate in the administrative operations of Cooper Electric.

In addition, defendant argues that an inside salesperson "performs work of substantial importance to the management or operation of the business of his employer or his employer's customers." As defined in the interpretive regulations, that phrase describes employees who "carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree." 29 C.F.R. § 541.205(c). It is axiomatic that a salesperson "performs work of substantial importance" to any sales-oriented business. Because of the large volume of sales generated by inside salespersons, it is clear that these individuals are important to the success of Cooper Electric. However, to suggest that in making these sales, an inside salesperson is carrying out "major assignments" is to strain interpretation of the regulation beyond common sense. As noted above, the nature of an inside sales-

persons work is to produce sales for Cooper Electric, not to develop or implement specific work assignments consistent with an overall company policy. There is no evidence in the record to sugggest that inside salespersons are formally assigned to particular customer accounts. To the contrary, it appears that the salespersons randomly receive orders over the telephone from a variety of buyers. Moreover, a careful reading of this provision indicates that the phrase was intended to "limit[] the exemption" for administrative employees rather than expand its scope. To conclude that this interpretive regulation was intended to include inside salespersons would unreasonably extend the application of an otherwise unambiguous provision.

On the factual record developed at trial, it is clear that defendant's inside salespersons do not engage in work "directly related to management policies or general business operations" of Cooper Electric. As a result, the Court need not address the second prong of the "short test". Accordingly, the Court concludes that inside salespersons fail to qualify for an exemption from the record-keeping and overtime provisions of the FLSA.

Turning to consideration of the status of purchasing agents under the FLSA, the Court notes that these particular employees are not, as defendant argues, "specifically included in the Labor Department's regulations as examples of the kind of employees who are exempt from the overtime and record keeping provisions of the F.L.S.A." The regulation cited by the defendant clearly states purchasing agents may qualify as administrative employees exempt under the Act "if they meet the other tests in § 541.2." 29 C.F.R. § 541.201. For purposes of this analysis, the Court assumes *arguendo* that purchasing agents participate in the administrative operations of the business such that the first prong of the short test is satisfied. Therefore, the Court considers the second prong of the "short test".

The testimony indicates that the purchasing agent's responsibilities are largely ministerial in nature. The primary duty is to insure that inventory for each of the various items that Cooper Electric sells is maintained between established minimum and maximum levels. To do this, the purchasing agent is required simply to count the number of items on hand and place an order with the manufacturer for the number of items necessary to

maintain the specified inventory. The purchasing agent rarely negotiates price when ordering goods from the manufacturer. Moreover, the inventory levels for all goods stocked by Cooper Electric were contained in the "boogey book" and were established by management from monthly sales reports. The purchasing agent had little, if any, input in establishing those levels. In light of all the evidence before the Court, it is clear that purchasing agents do not exercise the kind of discretion and independent judgment contemplated by the Act.

Accordingly, this Court concludes that purchasing agents do not qualify for an exemption from the overtime and record keeping provisions of the FLSA.

For the foregoing reasons, the Court concludes that defendant Cooper Electric has violated the record keeping and overtime provisions of the FLSA with regard to its employees working as inside salespersons and purchasing agents. In addition, the parties agree that assistant warehouse managers and computer operators are non-exempt. The Court therefore orders that the plaintiff pay the amount of unpaid overtime compensation due to these employees as set forth on plaintiff's Exhibit 16, Schedule A, which is hereby incorporated in this Opinion and Order.

Section 16(c) of the FLSA, 29 U.S.C. § 216(c), authorizes the Secretary of Labor to recover liquidated damages from an employer who violate the provisions of the Act. An award of liquidated damages is not punitive in nature, but rather is intended to compensate the employees by making them whole for the delay in receiving wages improperly withheld by the employer through a violation of the Act. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1064 (2d Cir. 1988); *Marshall v. Brunner*, 668 F.2d 748 (3d Cir. 1982). To avoid liability, the employer must show that its actions were "in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260.

> Good faith is a "subjective requirement, shown if the employer had 'an honest intention to ascertain and follow the dictates of the Act' " *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984) (quoting *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982)).

> The reasonableness test is an objective one, which "[i]gnorance alone" will not satisfy. *Id.* (quoting *Brunner*, 668 F.2d at 753).

Brock v. Claridge Hotel and Casino, 846 F.2d 180, 187 (3d Cir.), *cert. denied*, 109 S.Ct. 307 (1988). The Court may, in its sound discretion, award no liquidated damages or reduce the amount thereof to an appropriate level. *See* 29 U.S.C. § 260. As a prerequisite to the exercise of its discretion, however, the Court must make specific findings "that the employer acted in good faith and with reasonable grounds." *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1149 (3rd Cir. 1983). It should be noted that the employer bears a substantial burden of proof in this regard: unless both predicate facts are shown by the employer, the district court is without discretion to refrain from imposing liquidated damages. *See Claridge Hotel*, 846 F.2d at 187; *Brunner*, 668 F.2d at 753.

This Court concludes that the defendant in the instant case acted in good faith and had reasonable grounds for believing that the subject employees were exempt from the overtime and record keeping provisions of the Act. It is true, as plaintiff notes, that prior to the Wage and Hour Investigation conducted by the Department of Labor, defendant did not do any analysis or conduct any inquiry to determine whether the subject employees qualified for an exemption. Instead, since the inception of its business in 1961, defendant followed the well-established and widely accepted industry practice of compensating these employees on the basis of salary plus bonus where appropriate. The testimony is uncontroverted in this regard. Reliance on such an industry standard is reasonable and necessary if a company is to remain competitive in the market of qualified employees. Defendant cannot be faulted for its admitted lack of diligence in determining the applicability of the Act's requirements to these employees.

Moreover, there is no evidence in the record to suggest that defendant knowingly and willfully intended to avoid compliance with the requirements of the Act. In fact, the evidence indicates that as soon as actual non-compliance was brought to the attention of the defendant, the company voluntarily changed the pay structure for computer operators, assistant warehouse

managers and purchasing agents. This voluntary compliance clearly is indicative of defendant's good faith. Finally, defendant's refusal to alter the compensation package for inside salespersons was based on a legitimate, good faith dispute as to whether these employees did, in fact, qualify for an exemption from the requirements of the Act.[7] Indeed, the litigation of this case and the close factual determinations necessary for its ultimate resolution give credence to the reasonableness and good faith of the defendants actions. The record is clear that the defendant employer did not callously disregard its responsibility. Accordingly, the Court concludes that an award of liquidated damages is not appropriate in this case.

The Court, however, concludes that compensation should be awarded to the subject employees for the delay in recovering wages improperly withheld by the employer through a violation of the Act. In *Brock v. Richardson,* 812 F.2d 121 (3rd Cir. 1987), the Third Circuit concluded that pre-judgment and post-judgment interest is to be awarded in an action for back pay unless the equities of the case dictate otherwise. *See id.* at 127. In the instant case, the Court concludes that there are no circumstances which justify the denial of such interest. Accordingly, the Court Orders that pre-judgment interest at the statutory rate will accrue from the date the unpaid overtime compensation was earned by the respective employees listed in Schedule A. Post-judgment interest will begin to accrue if payment of the judgment is not made within sixty (60) days from the date of this Opinion and Order. Such an award will adequately compensate the subject employees without unduly burdening the defendant employer who acted in good faith.

Finally, the plaintiff requests that this Court enter an injunction to prevent the defendant from committing future violations of the Act and to restrain the continued withholding

---

[7] As noted above, an inside salesperson does negotiate on behalf of the company, promote sales to customers, and represent the company. The job description provided to all inside salespersons emphasizes the role of this employee in the overall success and operation of the company; because of the revenues generated by these employees, it is clear that their work in producing sales is of substantial importance to the defendant. While the Court ultimately concluded that these factors were not sufficient to meet the requirements for an exemption under the Act, the defendant's argument was reasonable and advanced in good faith.

of backwages due. The decision to grant injunctive relief under 29 U.S.C § 217 lies within the sound discretion of the trial court. *See Mitchell v. Lubin, McGaughy & Assoc.*, 358 U.S. 207, 215 (1959). As noted above, the defendants acted reasonably and in good faith throughout the course of the instant dispute. This Court has every reason to believe that the defendant will alter its practice to comply with this decision. In the event such compliance is not forthcoming, plaintiff can make an application to the Court on short notice, to request injunctive relief. For these reasons, plaintiff's request for injunctive relief is denied without prejudice.

/s/ NICHOLAS H. POLITAN

NICHOLAS H. POLITAN
U.S.D.J.

Dated: 5/17/90

APPENDIX C:

Appendix of Statutes and Regulations

I. Relevant sections of the Fair Labor Standards Act

(A) 29 U.S.C. 213(a)(1) provides:

"§213. Exemptions.

"(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

"(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities);" or

II. Relevant sections of the Code of Federal Regulations

(A) 29 C.F.R. § 541.205(a) provides in part:

"(a) The phrase 'directly related to management policies or general business operations of his employer or his employers' customers' describes those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work."

(B) 29 C.F.R. §541.205(b) provides in part:

"(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for, (sic) example, advising the management, planning, negotiating, representing the com-

pany, purchasing, promoting sales, and business research and control."

(C) 29 C.F.R. §541.205(c) provides in part:

"(c) . . . . Employees whose work is 'directly related' to management policies or to general business operations include those whose work affects policy or whose responsibility it is to execute or carry it out."

(D) 29 C.F.R. §541.201(b)(1) provides in part:

"(b) *Job titles insufficient as yardsticks* (1) The employees for whom exemption is sought under the term 'administrative' have extremely diverse functions and a wide variety of titles."

(E) 29 C.F.R. §541.201(b)(2) provides in part:

"(2) Many more examples could be cited to show that titles are insufficient as yardsticks. As has been indicated previously, the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities and salary meet all the requirements of the appropriate section of the regulations in Subpart A of this part."

FILED
FEB 20 1992
OFFICE OF THE CLERK

(3)

No. 91-944

In the Supreme Court of the United States

OCTOBER TERM, 1991

COOPER ELECTRIC SUPPLY CO. and
RICHARD A. COOPER, PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

DEBORAH GREENFIELD
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether petitioner's inside salespersons were "administrative" employees exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. 213(a)(1).

2. Whether the court of appeals correctly determined that petitioner was liable for liquidated damages under 29 U.S.C. 217.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Arnold v. *Ben Kanowsky, Inc.*, 361 U.S. 388 (1960)	8
Bratt v. *County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990), cert. denied 111 S. Ct. 962 (1991)	11, 12
Brock v. *Wilamowsky*, 833 F.2d 11 (2d Cir. 1987)	14
Dalheim v. *KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990)	9, 11
Gilstrap v. *Synalloy Corp. Indus. Piping Supply Co. Div.*, 409 F. Supp. 621 (M.D. La. 1976)	11
Glenn v. *General Motors Corp.*, 841 F.2d 1567 (11th Cir.), cert. denied, 488 U.S. 948 (1988)	14
Gusdonovich v. *Business Information Co.*, 705 F. Supp. 262 (W.D. Pa. 1985)	11, 12
Harris v. *District of Columbia*, 741 F. Supp. 254 (D.D.C. 1990)	11, 12
Harrison v. *Preston Trucking Co.*, 201 F. Supp. 654 (D. Md. 1962)	11
Hodgson v. *Penn Packing Co.*, 335 F. Supp. 1015 (E.D. Pa. 1971)	11, 12
Horne v. *Singer Business Machs., Inc.*, 413 F. Supp. 52 (W.D. Tenn. 1976)	11
Icicle Seafoods, Inc. v. *Worthington*, 475 U.S. 709 (1986)	9
Idaho Sheet Metal Works, Inc. v. *Wirtz*, 383 U.S. 190 (1966)	8
Jewel Tea Co. v. *Williams*, 118 F.2d 202 (10th Cir. 1941)	13

Cases—Continued: Page

Laffey v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978) 14
Marshall v. *Brunner*, 668 F.2d 748 (3d Cir. 1982) 13
McComb v. *New York & New Brunswick Auto Express Co.*, 95 F. Supp. 636 (D.N.J. 1950) 11
McComb v. *Robert W. Hunt Co.*, 172 F.2d 751 (7th Cir. 1949) 12
Tony & Susan Alamo Found. v. *Secretary of Labor*, 471 U.S. 290 (1985) 8
Williams v. *Tri-County Growers, Inc.*, 747 F.2d 121 (3d Cir. 1984) 13-14

Statutes and regulations:

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*:
§ 7, 29 U.S.C. 207 4
§ 7(a)(1), 29 U.S.C. 207(a)(1) 2, 13
§ 11, 29 U.S.C. 211 4
§ 13(a)(1), 29 U.S.C. 213(a)(1) 2, 13
29 U.S.C. 260 7
29 C.F.R.:
Section 541.2 2
Section 541.205(a) 3, 4, 5, 7, 9, 10
Section 541.205(b) 3
Section 541.205(c) 3
Section 541.205(c)(1) 10
Section 541.207(d)(2) 12
Section 541.214(a) 2, 4, 5, 6, 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-944

COOPER ELECTRIC SUPPLY CO. and
RICHARD A. COOPER, PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A28) is reported at 940 F.2d 896. The opinion of the district court (Pet. App. B5-B17) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1991. A petition for rehearing was denied on September 13, 1991 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on December 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In general, Section 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for any hours worked in excess of 40 hours a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption, however, for any employee "employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

The Department of Labor has promulgated regulations defining the scope of the exemption for administrative employees. Under the "short test" applicable to the employees at issue in this case, the exemption is available if an employee's "primary duty" consists of (1) "the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers," and (2) "such primary duty includes work requiring the exercise of discretion and independent judgment." 29 C.F.R. 541.214(a); see Pet. App. A9 & n.4.[1]

---

[1] The general definition of administrative employees is set forth in 29 C.F.R. 541.2. It sets forth four criteria (which are known as the "long test") for determining whether employees earning, with certain exceptions, $155 or more per week are administrative employees. Section 541.2 further provides, however, that employees earning not less than $250 per week who meet the two requirements of the "short test" set out in text shall be deemed to meet the other two requirements of the "long test."

Elaborating on the requirements of the "short test," the regulations define work "directly related to management policies or general business operations" as (29 C.F.R. 541.205(a)):

> those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business.

Persons performing "work of substantial importance" within the meaning of that regulation are those whose activities "affect[] policy or whose responsibility it is to execute or carry it out," including "a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree." 29 C.F.R. 541.205(c). Similarly, the regulations provide that the "administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 29 C.F.R. 541.205(b).

2. Petitioner Cooper Electric Company is a New Jersey corporation which operates an electrical supply business with approximately 120 employees, including inside salespersons. Pet. App. A5. Petitioner Richard Cooper is the president of the company. The company's inside salespersons have been paid a fixed salary plus incentive bonuses, but not overtime. The salespersons spend a majority of their time making

telephone sales of electrical products to contractors, industrial buyers, institutions, and government organizations. A small percentage of inside sales are made to individual consumers. Most of the goods sold by inside salespersons come from petitioners' in-house inventory. Salespersons normally obtain price quotations for these items from trade publications, computerized price sheets, manufacturer's representatives, and an in-house computer. Depending on the particular transaction, the inside salespersons may deviate from the price quotes to some degree. When an item is not in stock, the inside salespersons order it from the manufacturer, in which case they negotiate the cost to petitioners as well as to the customer. *Id.* at A5, A12-A13.

3. The Department of Labor brought this action against petitioners, alleging that they violated the overtime and recordkeeping requirements of the FLSA, 29 U.S.C. 207 and 211, with respect to inside salespersons and other employees. After a trial, the district court concluded that the inside salespersons do not satisfy the first element of the short test for the administrative exemption, finding that those salespersons do not perform "work directly related to [petitioners'] management policies or general business operations," 29 C.F.R. 541.214(a). Pet. App. B11-B12. The court determined that "inside salespersons spend nearly all their time on the telephone receiving orders from customers seeking to purchase electrical supplies." *Id.* at B12. "The narrow scope of [the salespersons'] responsibility," the court continued, compelled the conclusion that "they engage in activities relating to the day-to-day 'production' of sales within the plain meaning of [29 C.F.R. 541.205 (a)] rather than 'the administrative operations of a business.'" *Ibid.*

The court rejected petitioners' contention that their inside salespersons should be characterized as administrative employees because they "represent the company," "promote sales," and "negotiate" on behalf of the company. Pet. App. B12. Although petitioners' characterization of the salespersons' responsibilities meets "the literal language of the interpretive regulations," the court explained, "these activities are part and parcel [of] the inside salespersons[']' primary responsibility of producing sales," "the impact on administrative operations of the business is minimal," and the inside salespersons "are not engaged in 'servicing' the business so as to participate in [petitioners'] administrative operations." *Ibid.*

The district court also found that the inside salespersons do not, within the meaning of 29 C.F.R. 541.214(a), "perform[] work of substantial importance to the management or operation of the business of [their] employer or [their] employer's customers." Pet. App. B12-B13. Although "[i]t is axiomatic that a salesperson 'performs work of substantial importance' to any sales-oriented business," the court explained, any suggestion that petitioners' salespersons "carry[] out 'major assignments' is to strain interpretation of the regulation beyond common sense." *Id.* at B12. The court found that an inside salesperson's work "is to produce sales * * *, not to develop or implement specific work assignments consistent with an overall company policy." *Id.* at B13. In fact, the court continued, inside salespersons are not "formally assigned to particular customer accounts," but rather "randomly receive orders over the telephone from a variety of buyers." *Ibid.*

The court's judgment required petitioners to pay overtime compensation that had been withheld from the inside salespersons, with prejudgment and post-

judgment interest. The court declined, however, to award liquidated damages. With respect to that form of relief, the court ruled that petitioners "acted in good faith and had reasonable grounds for believing that the subject employees were exempt from the overtime and record keeping provisions of the Act." Pet. App. B15. Although petitioners "did not do any analysis or conduct any inquiry to determine whether the subject employees qualified for an exemption," the court reasoned, petitioners "followed the well-established and widely accepted industry practice" regarding such employees. *Ibid.* The court found further support for its conclusion in the fact that petitioners had changed their practices with respect to some employees (although not the inside salespersons) when the Department of Labor began its investigation. The court also ruled that there was a "legitimate, good faith dispute" as to whether the salespersons were exempt. *Id.* at B16.

4. The court of appeals affirmed the district court's determination that petitioners had violated the Act's overtime requirements with respect to inside salespersons, but remanded for an award of liquidated damages and vacated the award of prejudgment interest. Pet. App. A5-A28.

Like the district court, the court of appeals held that petitioners' inside salespersons do not satisfy the first element of the short test for administrative employees—which requires an employee to perform work "directly related to management policies or general business operations" of his employer, 29 C.F.R. 541.214(a). The court sustained the district court's finding that the salespersons "are production rather than administrative employees" within the framework established by the relevant regulations, rejecting petitioners' contention that only workers

engaged in the manufacture of tangible goods can be "production" workers. Pet. App. A13-A14.[2] The panel also upheld, as not clearly erroneous, the district court's determination that petitioners' inside salespersons "are not engaged in 'servicing' the business so as to participate in [petitioners'] administrative operations." *Id.* at A15-A17. Finally, the court of appeals held, as a matter of law, that petitioners' inside salespersons "do not 'perform work of substantial importance to the management or operation' " of petitioners' business. *Id.* at A18.

With respect to the remedy for petitioners' violations, the court of appeals noted that the FLSA requires an award of liquidated damages unless "the act or omission giving rise to such action was in good faith and [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," Pet. App. A21 (quoting 29 U.S.C. 260). Further, the court continued, an employer bears the burden of showing "that he took affirmative steps to ascertain the Act's requirements, but nonetheless violated its provisions." Pet. App. A22.

Here, the court of appeals held, "the district court erred as a matter of law by concluding that [petitioners] violated FLSA overtime requirements in *reasonable* good faith." Pet. App. A23. The panel found "dispositive" the district court's findings that petitioners "did not do any analysis or conduct any

---

[2] The panel noted that 29 C.F.R. 541.205(a) outlines dichotomies between (1) the "administrative" and "production" operations of most businesses and (2) the "administrative" and "sales" operations of retail and service businesses. In this case, the court found, the relevant dichotomy was between "administrative" and "production" work. Pet. App. A10.

inquiry to determine whether [their] . . . employees qualified for an exemption" and that they "admitted * * [a] lack of diligence in determining the applicability of the Act's requirements." *Id.* at A25. The court of appeals addressed, and found insufficient, each of the grounds on which the district court had relied in declining to award liquidated damages. *Id.* at A25-A27. The panel concluded that "the district court had no discretion to deny liquidated damages for [inside salespersons] because, first and foremost, [petitioners] had not demonstrated that [they] took affirmative steps to ascertain the legality of [their] pay practices before Labor's investigation." *Id.* at A27.[3]

ARGUMENT

This case involves only the application of established legal standards to the particular facts of this case. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1.a. Because the FLSA requires "broad coverage" to effectuate its goals, *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985), exemptions under the Act are limited to employees "plainly and unmistakably within their terms and spirit," *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). An employer bears the burden of proving the applicability of an exemption. *Idaho Sheet Metal Works, Inc.* v. *Wirtz*, 383 U.S. 190, 206 (1966). The court of appeals' decision is consistent with these general principles and with the regula-

[3] The court vacated the district court's award of prejudgment interest, reasoning that liquidated damages would compensate employees for the delay in their receipt of overtime pay. Pet. App. A27 & n.13.

tions governing the availability of the FLSA's exemption for "administrative" employees.

Petitioners' inside salespersons cannot qualify for that exemption unless their "primary duty" consists of "the performance of office or nonmanual work directly related to management policies or general business operations" of petitioners or their customers. 29 C.F.R. 541.214(a). In resolving that issue, both lower courts properly considered whether the salespersons engage in "activities relating to the administrative operations of [petitioners'] business as distinguished from 'production' * * * work," and whether they "perform work of substantial importance to the management or operation of the business." 29 C.F.R. 514.205(a). As the court of appeals noted, those inquiries are "fact intensive." Pet. App. A12; see *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713-714 (1986); *Dalheim* v. *KDFW-TV*, 918 F.2d 1220, 1226 (5th Cir. 1990).

The district court found, in essence, that petitioners' inside salespersons "spend nearly all their time on the telephone receiving orders from customers seeking to purchase electrical supplies" and that they "randomly receive orders * * * from a variety of buyers." Pet. App. B12, B13. While acknowledging that the salespersons' responsibilities are not purely ministerial and that their collective contribution to petitioners' business is significant, the court determined that "their impact on administrative operations of the business was minimal" and that they did not carry out "major assignments" in the business. *Id.* at B12. The court of appeals upheld those findings as not clearly erroneous, observing that the inside salespersons were "not more than routine functionaries, albeit important employees." *Id.* at A18. That

determination presents no issue of the sort calling for this Court's attention.

b. Petitioners' principal contention is that the inside salespersons cannot fairly be characterized as "production" workers. Pet. 4-8. That contention is based more on semantics than on substance. In the context of the regulations as a whole, it is crystal clear that the reference to "production" work was not intended as a reference to manufacturing employees. Rather, as both the lower courts recognized (Pet. App. A10, B11-B12), it describes one side of the distinction the regulations draw between the "administrative operations" of a business and the business's more routine functions; the purpose of that distinction is to separate "persons who perform work of substantial importance to the management or operation of the business" from those who do not. 29 C.F.R. 514.205(a).

The regulations recognize that many non-manufacturing workers, such as clerks and bank tellers, who "hold the run-of-the-mine positions in any ordinary business" are not administrative employees. 29 C.F.R. 541.205(c)(1). When an employer's business consists of wholesale sales, rather than the manufacture of tangible goods, it is entirely consistent with the scheme of the regulations to regard lower-level employees as involved in the "production" of sales. As the court of appeals recognized (Pet. App. A14), petitioners' interpretation would lead to the untenable result that all employees engaged in wholesale sales would qualify for the administrative exemption.

The courts of appeals have often recognized that the "production" workers to whom 29 C.F.R. 541.205(a) refers include employees not engaged in the produc-

tion of goods. *Dalheim*, 918 F.2d at 1230 (television producers); *Bratt* v. *County of Los Angeles*, 912 F.2d 1066, 1069-1070 (9th Cir. 1990) (probation officers), cert. denied, 111 S. Ct. 962 (1991); *Harris* v. *District of Columbia*, 741 F. Supp. 254, 262 (D.D.C. 1990) (housing inspectors); *Gusdonovich* v. *Business Information Co.*, 705 F. Supp. 262, 264-265 (W.D. Pa. 1985) (investigator). There is no conflict among the courts of appeals on that question.[4]

---

[4] All of the district court cases on which petitioners and their amici rely (Pet. 7, 8, 14 n.9; Amicus Br. 7) are consistent with the court of appeals' decision in this case. In *Hodgson* v. *Penn Packing Co.*, 335 F. Supp. 1015, 1021 (E.D. Pa. 1971), the district court found that an inside salesperson who, like the employees in the instant case, spent "most of his time taking orders by telephone" and who normally did not "digress from the standard pricing sheet" was not an administrative employee. In other cases, employees performing more substantive tasks than petitioners' inside salespersons were held to qualify for the exemption for administrative employees. See *Gilstrap* v. *Synalloy Corp. Indus. Piping Supply Co. Div.*, 409 F. Supp. 621, 625-626 (M.D. La. 1976) (an employee whose primary duty was to formulate and implement a new system of inventory control did not forfeit the administrative exemption merely because the job required some inside sales); *Harrison* v. *Preston Trucking Co.*, 201 F. Supp. 654, 659 (D. Md. 1962) (exemption applicable to dispatcher who assigned freight and drivers, and recommended hiring, firing and scheduling changes); *Horne* v. *Singer Business Machs., Inc.*, 413 F. Supp. 52, 53 (W.D. Tenn. 1976) (exemption applicable to employee who devised and modified computer programs and participated in company policymaking); *McComb* v. *New York & New Brunswick Auto Express Co.*, 95 F. Supp. 636, 640 (D.N.J. 1950) (dispatchers "completely in charge of the operation" qualified as administrative employees).

It is true, as petitioners' amici note (Amici Br. 11), that "certain wholesale salesmen" may qualify for the exemption.

c. Petitioners also contend that their inside salespersons perform work of substantial importance to the management or operation of the business. Pet. 12-15. The lower courts' contrary determination, which involves only the application of the Department's regulation to the particular facts of this case, was well-founded. The lower courts have uniformly refused to equate activities which, like those of petitioners' inside salespersons, simply carry out the employer's "day-to-day * * * business affairs" (*Bratt*, 912 F.2d at 1070), with administrative-type work. See also *McComb* v. *Robert W. Hunt Co.*, 172 F.2d 751, 754 (7th Cir. 1949); *Harris*, 741 F. Supp. at 262; *Gusdonovich* v. *Business Information Co.*, 705 F. Supp. at 264-265.[5] In any event, review of the lower courts' finding on this question would serve no purpose; the regulation's reference to "work of substantial importance" serves only to clarify the standard set forth earlier in the same section of the regulations. That application of the "substantial impor-

---

29 C.F.R. 541.207(d)(2). Accord *Penn Packing*, 335 F. Supp. at 1020-1021 n.3 ("an inside salesman meeting all of the requirements for executive or administrative personnel" is eligible). The lower courts properly considered whether petitioners' inside salespersons satisfied the generally applicable standards, and concluded that they did not.

[5] Petitioners are mistaken in suggesting that the court of appeals applied an incorrect standard of review to this issue. See Pet. 15. The court simply held that, on the findings made by the district court, the law compelled the conclusion that the salespersons do not perform work of substantial importance. The court of appeals did not suggest that application of the "work of substantial importance" standard invariably involves a pure issue of law.

tance" standard does not, therefore, present a free-standing issue calling for this Court's review.[6]

2. Petitioners also contend (Pet. 16) that they should not have been liable for liquidated damages because they "followed well established and accepted industry practice." In their view, the court of appeals' decision casts a new and onerous burden on employers who seek to comply with the law. *Id.* at 16-18.

It is well established, however, that an award of liquidated damages is mandatory unless an employer demonstrates both that it has acted in subjective "good faith" and that there are objective "reasonable grounds" supporting its position. *Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984); *Marshall* v. *Brunner*, 668 F.2d 748, 752 (3d Cir. 1982). To satisfy the subjective good faith re-

---

[6] Petitioners also seek support for their position in cases addressing the question whether employees have "engaged in commerce," as opposed to the "production of goods for commerce," for purposes of the Act's jurisdictional requirement, 29 U.S.C. 207(a)(1). Pet. 8-12; see Amici Br. 10-11. Those cases are irrelevant to this case; there is no dispute that petitioners' inside salespersons are "engaged in commerce" and thus subject to the statute.

Nor is there any merit to amici's assertion (Amici Br. 5-6) that because inside salespersons perform a function comparable to that of outside salespersons, they too should be exempt from the FLSA's overtime provisions. Outside salespersons are exempt not because they are administrative employees, but because Section 13(a)(1), 29 U.S.C. 213(a)(1), expressly excludes them from the Act's overtime requirements. This statutory exclusion is based upon the virtual total control those employees enjoy over their working hours and upon their lack of direct supervision. See *Jewel Tea Co.* v. *Williams*, 118 F.2d 202, 208 (10th Cir. 1941). Petitioners' salespersons do not share those characteristics.

quirement, an employer must have had "an honest intention to ascertain and follow the dictates of the Act." See *Williams* v. *Tri-County Growers, Inc.*, 747 F.2d at 129 (under the objective reasonableness requirement, "[i]gnorance alone will not exonerate the employer").

Petitioners cannot satisfy those standards. The district court found that they "did not do any analysis or conduct any inquiry to determine whether the [inside salespersons] qualified for an exemption." Pet. App. B15. The courts have uniformly rejected claims that reliance on a company's or an industry's longstanding failure to pay overtime, unaccompanied by affirmative efforts to ascertain the law, will justify denying liquidated damages. *Brock* v. *Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987). See *Tri-County Growers*, 747 F.2d at 129 (that employer has violated the law "for a long time without complaints from employees" does not show requisite good faith); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 465 (D.C. Cir. 1976) (same), cert. denied, 434 U.S. 1086 (1978); see also *Glenn* v. *General Motors Corp.*, 841 F.2d 1567, 1573 (11th Cir.) (rejecting market force theory), cert. denied, 488 U.S. 948 (1988). As the court below recognized, "[i]n lieu of any affirmative attempt by an employer to determine the legality of its wage payment practices, the employer's adherence to customary and widespread industry practices that violate the Act's overtime pay provisions is not evidence of an objectively reasonable good faith violation." Pet. App. A26.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

DEBORAH GREENFIELD
Attorney
Department of Labor

FEBRUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45325

Supreme Court, U.S.
FILED
JAN 9 1992
OFFICE OF THE CLERK

NO. 91-944

In The Supreme Court of the United States October Term, 1991

COOPER ELECTRIC SUPPLY CO.
***and* RICHARD A. COOPER**

Petitioners,

vs.

LYNN MARTIN, *Secretary of Labor*, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AND NATIONAL ASSOCIATION OF ELECTRICAL DISTRIBUTORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LOUIS R. MARCHESE
ROBERT W. BAKER
20 North Wacker Drive
Chicago, IL 60606
(312) 782-1829

Attorneys for Amicus Curiae

Of Counsel

HALFPENNY, HAHN, ROCHE & MARCHESE
20 North Wacker Drive
Chicago, IL 60606

ARMI
Legal Copies of America (312) 332-2764

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT 1

I. INSIDE SALESPERSONS IN THE WHOLESALE-DISTRIBUTION INDUSTRY HAVE A UNIQUE ROLE THAT MEETS ALL OF THE REQUIREMENTS FOR ADMINISTRATIVE EXEMPTION FROM THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT 3

II. INSIDE SALESPERSONS' RELIANCE ON TELEPHONE USE DOES NOT DIMINISH THEIR FUNCTION BUT INSTEAD PROVIDES GREATER PRODUCTIVITY AND FASTER RESPONSE VIA ADVANCED TECHNOLOGY 6

III. INSIDE SALESPERSONS WHO PRODUCE SALES MAY BE ADMINISTRATIVELY EXEMPT 9

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page

A.B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942) 11

Borden Co. v. Borella, 325 U.S. 679 (1945) 11

Clark v. J.M. Benson Co., Inc., 789 F.2d 282 (4th Cir. 1986) 4 n.4

Dalheim, v. KDFW-TV, 706 F.Supp. 493 (N.D. Tex. 1988) 9 n.10

Dole v. Cooper, No. 87-2568, slip op. (D. N.J. May 17, 1990) 10 n.12, 12 n.15

Goldberg v. Arkansas Best Freight System, Inc., 206 F.Supp. 828 (W.D. Ark. 1962) 7

Harrison v. Preston Trucking Company, 201 F.Supp. 654 (D. Md. 1962) 7

Horne v. Singer Business Machines, Inc., 413 F.Supp. 52 (W.D. Tenn. 1976) 5

Lubrizol Corporation v. Environmental Protection Agency, 562 F.2d 807 (1977) 14 n.17

Manhattan General Equip. Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936) 9 n.11

Martin v. Cooper Electric Supply Co., 940 F.2d 896 (3d Cir. 1991) 4 n.2, 8 n.9

Mitchell v. H.B. Zachry Co., 362 U.S. 310 (1960) 10 n.13

Mitchell v. Household Finance Corporation, 208 F.2d. 667 (3rd Cir. 1953) 10 n.13

Roland Electrical Co. v. Walling, 326 U.S. 657 (1946) 11

Walling v. General Industries Co., 330 U.S. 545 (1947) 4 n.4

STATUTES AND REGULATIONS

Page

29 CFR 541.201(b)(2) 11 n.14

29 CFR 541.205(b) 3, 12

29 CFR 541.205(c)(4) 6 n.5

29 CFR 541.207(d)(2) 6 n.5, 11

29 CFR 541.208(d) 9

29 U.S.C.A. 203(j) 10

MISCELLANEOUS

Armstrong, P., *Inside Sales*, Supply House Times, November, 1983 ..... 8 n.8

Danenburg W., Moncrief R., Taylor W., *Introduction to Wholesale Distribution* (1978) 8 n.7

Nasar, *America Still Reigns in Services*, Fortune, June 5, 1986 ..... 7 n.6

NO. 91-944

In The Supreme Court of the United States October Term, 1991

COOPER ELECTRIC SUPPLY CO.
and RICHARD A. COOPER

Petitioners,

vs.

LYNN MARTIN, *Secretary of Labor*, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AND NATIONAL ASSOCIATION OF ELECTRICAL DISTRIBUTORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The National Association of Wholesaler-Distributors and the National Association of Electrical Distributors, with the consent of the parties, present this brief in support of petitioners.[1]

The National Association of Wholesaler-Distributors (NAW) is a federation of approximately 116 national wholesaler-distributor trade associations, 54 state and regional trade associations and some 2,000 individual wholesale-distribution

[1] Letters of Consent have been filed with the Clerk of the Court.

firms, representing in the aggregate, over 40,000 wholesale-distribution companies nationwide.

The National Association of Electrical Distributors (NAED) is a national trade association comprised of some 870 main house electrical distributors dealing in a full range of electrical products with over 3,900 outlets nationally representing approximately 75% of all electrical distributors in the U.S.

The wholesale-distribution industry, of which the electrical distribution segment forms an important part, is a unique and people-oriented industry. Wholesale-distribution is a critical link in the marketing chain with sales in the latest reporting year exceeding two trillion dollars. This large and significant industry employs approximately 5.8 million persons, all of whom are engaged in one form or another in performing the primary function of wholesale-distribution, the supply of the appropriate goods and services to customers when and where the goods are needed.

The industry depends significantly on highly trained, skillful and resourceful employees who are consistently called upon to exercise discretion and sound judgment. It utilizes the most modern technology available to effectively carry out its mission to serve the U.S. and the world marketplace with a system of distribution unequaled anywhere else.

The decisions of the courts below in this matter seriously threaten the continuing effective performance of these functions by arbitrarily relegating to an insignificant and unimportant status those persons in the wholesale-distribution industry who utilize the highest degree of skills and modern technology available to serve this vast marketplace. These decisions present legal issues that gravely threaten a U.S. industry that currently leads the way to increased national productivity. The decisions of the courts below totally ignore the unique role of the inside salesperson in the people-oriented, service-driven wholesale-distribution industry. Wholesaler-distributor inside salespersons negotiate on behalf of their employers, represent their companies to the customers and suppliers, and promote sales. They perform job functions that are directly related to the employer's management policies and general business operations.

The failure of the courts below to grasp the overwhelming and distinctive importance of the inside salesperson to the wholesale-distribution industry is reflected in their dismissal of the inside salesperson's efforts as "routine" and not of substantial importance. The implicit perception is that inside salespersons perform clerical duties that are on par with hourly paid telephone operators. This woeful misjudgment is out-of-step with business conduct in the modern era. The proliferation of electronic media — telephones, computers, and fax machines — has removed the need for the immediacy of personal contact. It is now possible and significantly more effective to wield administrative authority from inside the wholesale-distribution facility.

The preoccupation of the decisions below with the characterization of inside sales as a production activity is a radical departure from the realities of the job objectives and responsibilities required of wholesaler-distributor inside salespersons. The focus of the inside salesperson is squarely upon the administrative duties enumerated in the Department of Labor's interpretive regulations ("advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control" 29 CFR § 541.205(b)), and not upon the production process itself. The findings below that the inside salesperson's administrative responsibilities are not considered exempt if part of the production process is unreasonable, and inconsistent with the applicable regulations.

The parties herein are properly concerned with establishing their respective positions. Amici provide the means to gain the broad perspectives required for ultimate determination of this matter consistent with statutory interest.

I. INSIDE SALESPERSONS IN THE WHOLESALE-DISTRIBUTION INDUSTRY HAVE A UNIQUE ROLE THAT MEETS ALL OF THE REQUIREMENTS FOR ADMINISTRATIVE EXEMPTION FROM THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

The decisions of the courts below fail to take appropriate cognizance of the unique job performance required of the inside salesperson in the wholesale-distribution industry. The measure

for exempt status is discretion and independent judgment, and not mobility. Inside salespersons of a wholesaler-distributor are accorded the same authority to conduct sales as the outside salesmen, and yet are dismissed by the court below as "routine functionaries" performing "routine selling efforts."[2] This perfunctory conclusion was made without inquiry into the custom and practices of the wholesale-distribution industry or the specific nature of the work of an inside salesperson for a wholesaler-distributor. Exemptions are to be applied after a detailed factual examination of the duties of the employee.[3] Moreover, the significant factor in evaluating the presence of discretion in an employee's work is the nature of the work itself.[4] No such analysis formed the basis of either of the opinions of the courts below.

The work of the wholesaler-distributor inside salesperson is directly related to the business operations of the wholesaler-distributor. It requires that certain degree of responsibility and judgment that provides the basis for the administrative exemption. To find otherwise will have an immediate and severe impact upon the wholesale-distribution industry. Wholesaler-distributors consider their inside salespersons to be responsible, judgmental, well-trained, highly paid and thus administrative employees exempt from the Fair Labor Standards Act (FLSA). If the findings below are upheld, these same employers will suddenly find themselves liable for reimbursement of overtime wages and possible civil fines. Such potential liability would have a substantial adverse economic effect upon the industry, and upon the public which it serves. It would also adversely impact on attracting and encouraging capable, motivated people to consider lifetime careers in wholesale-distribution. Rather than affirming such a debilitating outcome, this court should give full consideration to the demands of the wholesale-distribution industry and existing legal precedent.

Wholesaler-distributor inside salespersons are highly compensated company representatives who are under general

---

[2] *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 905-06 (3d Cir. 1991)

[3] *Walling v. General Industries Co.*, 330 U.S. 545 (1947)

[4] *Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 288 (4th Cir. 1986)

supervision and who utilize the most modern technology available to them. Their work is non-manual. It involves the exercise of responsibility and judgment on a regular and recurring basis. It is a position that is of major importance to the business of sales and service at the wholesale-distribution level.

Wholesaler-distributor inside salespersons do not merely apply their acquired skills or make decisions of little consequence. They do and they must, in order to function properly and effectively, work directly with customers. The inside salesperson must be aware of the needs of customers and must have the product knowledge to advise which specific goods and services the company offers can respond to those needs. When questions arise concerning the quality of the product and its performance under different applications and varying situations, the answers require highly trained individuals in a customer service/sales support role. Discussions between inside salespersons and customers include maintenance matters, product information and product applications assistance, repair parts availability and service, the application of interchangeable and substitute parts and the interface of such parts with competitive products during operations.

If outside salespersons are characterized as professional in their relationships with the company and its customers, the inside salesperson must be considered even more so in his approach, technique and company/customer relationship. The inside salesperson has day-to-day contact with customers and can make relationships flourish or wither on the vine. Maximum levels of competency are needed at such a key position. The conduct of business by the inside salesperson in wholesale-distribution is the conduct of the business of the wholesaler-distributor. It is an important position demanding responsibility, judgment and discretion. Where these circumstances are present, the decisions have overwhelmingly held that the administrative exemption applies. *See, e.g., Horne v. Singer Business Machines, Inc.*, 413 F.Supp. 52 (W.D. Tenn. 1976). Yet, the decisions below ignore such precedent. Thus, review by this court is needed to remove the obstacles posed by those decisions to the appropriate application of the administrative exemption.

Inside salespersons in the electrical distribution and the rest of the wholesale-distribution industry are bona fide administrative personnel under the Secretary of Labor's short test for exemption from the overtime requirements of the FLSA. Of this there can be little doubt. The work performed by the wholesaler-distributor inside salesperson is of great import, and has direct bearing upon the general business operations of the wholesaler-distributor. Inside salespersons share the same scope, duty and responsibilities as outside salespersons, with equal responsibilities, judgmental requirements, training, experience, and salaries. Inside salespersons in the wholesale-distribution industry exercise the same discretion and judgment as buyers, representatives and other employees judged exempt by the interpretive regulations of the Department of Labor.[5] To hold that such employees are not exempt from the overtime requirements of the FLSA can only cause substantial economic hardship to this enormous, vital industry.

II. INSIDE SALESPERSONS' RELIANCE ON TELEPHONE USE DOES NOT DIMINISH THEIR FUNCTION BUT INSTEAD PROVIDES GREATER PRODUCTIVITY AND FASTER RESPONSE VIA ADVANCED TECHNOLOGY.

To maintain their marketplace leadership, wholesaler-distributors are continuing to aggressively integrate leading-edge technology into their businesses. Use of this technology is enabling firms to improve productivity and to offer even more tailored, market responsive, value-added services to suppliers and customers. The role of the inside salesperson in utilizing this technology is essential. The inside salesperson is on the cutting edge and technology is the tool of his trade.

---

[5] *See, e.g.*, 29 C.F.R. § 541.205(c)(4) (". . . a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments"); 29 C.F.R. §207(d)(2) (". . . a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities . . . buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers.")

The fact that inside salespersons concentrate their communications principally through the use of electronic means does not diminish, but actually enhances the quality of such communications by using the most modern technology available. When it was argued in *Goldberg v. Arkansas Best Freight System, Inc.*, 206 F.Supp. 828 (W.D. Ark. 1962), that the duties of two city dispatchers were purely routine and not related to management policies or the general business operations because most of their work was spent on the phone, the court cited *Harrison v. Preston Trucking Company*, 201 F.Supp. 654 (D. Md. 1962) where the *Harrison* court said:

> "the receipt of telephone calls ... was directly and closely related to his primary duties. The mere fact that at times some of these functions might be performed by clerical employees is ... immaterial." *Id.* at 658.

The essence of wholesale-distribution including electrical distribution is sales and service. Customers and suppliers recognize that wholesaler-distributors provide valuable services to them and to the public in general by supplying a vast network of distribution channels. The industry produces economies of scale of such magnitude as to present the best basic groundwork for increases in national productivity. American productivity currently is bounding ahead in only a few key industries, one of which is wholesale trade.[6]

The realities of technology and economics in the wholesale-distribution industry belie any clean parceling of the inside salesperson's position such as found in the decisions below. The lower courts fail to take heed of the fundamental changes that have been occurring in the wholesale-distribution industry for the past twenty years.

The basic change in wholesale-distribution from a historical manufacturer-producer orientation began in the 1970's when there was a growing demand by customers for improved product service which produced a greater emphasis on consumer-oriented operations. The wholesaler-distributor today has a greater concern for meeting the total needs of customers on a systems concept or total package basis. Cost savings and good customer

---

[6] Nasar, *America Still Reigns in Services*, Fortune, June 5, 1986 at 65

service (versus outside sales contracts) are the decisive factors that sell customers in today's market. As a result, wholesaler-distributors require higher degrees of competency and training from those persons who deal directly with the customer through modern communications technology.[7]

A route sales mentality does not exist today. As overhead costs have increased and customers have less time to spend with outside salesmen, inside sales has become the accepted and preferred alternative. The inside salesperson handles a greater number of customers without added expense. The outside sales role has become primarily one of public relations and goodwill ambassadorship.

The well-informed, technically-minded inside sales staff handles customer problems concerning equipment or processes and is immediately available to answer questions or solve problems. Studies have shown that inside sales is a way to reach marginal accounts, increase sales and profits and provide better service, clearly a direct involvement in the general business operations of the wholesaler-distributor.[8]

The appellate court properly recognized that the regulations of the Department of Labor "constitute the agency's 'body of experience and informed judgment' " about the FLSA, and therefore should be given "considerable and in some cases decisive weight."[9] It is vital that the weight afforded the regulations be measured under current conditions of business, or, in this instance, the current manner in which modern day wholesale-distribution business is conducted. The regulations are over thirty years old. Although the age of the regulations is not per se an infirmity, it is arguable that considerable technical advances have taken place since then which affect the weight

---

[7] Danenburg W., Moncrief R., Taylor W., *Introduction to Wholesale Distribution* (1978)

[8] Armstrong P., *Inside Sales*, Supply House Times, November, 1983 at 178

[9] *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 900 (3d Cir. 1991)(quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944))

to be given such regulations.[10]

Consider the interpretation in the regulations of the status of a worker who makes day-to-day determinations as to whether or where to route correspondence:

> "The work of determining whether to answer correspondence personally, call it to his superior's attention or route to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in 541.2." 29 CFR §541.208(d).

The fact that an employee responsible for passing judgment upon the daily mail would be held out as an example of an exempt administrative employee, and yet the inside sales position is found wanting of discretion and independent judgment is incongruous.

A regulation (or an interpretation of a regulation) that does not carry out the will of Congress but operates to create a new rule that is out of harmony with the statute is a mere nullity. Such an interpretation must not only be consistent with the statute but also must be reasonable.[11] The purport of the position of the Department of Labor and the impact of the decisions of the courts below cannot be disguised. They would accomplish precisely what Congress meant to prevent when Congress provided for exemptions from the FLSA. Such a result displays a studied indifference to Congressional intent to actually provide for an administrative exemption for those involved in the general business operations of a company at a critical business level and in an important manner.

III. INSIDE SALESPERSONS WHO PRODUCE SALES MAY BE ADMINISTRATIVELY EXEMPT.

It strains credulity to base the non-exempt status of inside salespersons on the erroneous conclusion that because their work involves sales, inside salespersons are therefore engaged in the production of sales and are not exempt because they are

---

[10] *Dalheim v. KDFW-TV*, 706 F.Supp. 493 (N.D. Tex. 1988)

[11] *Manhattan General Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936)

production workers.

The opinions below were based solely on a first prong analysis of the short test for administrative exemption. Both courts depicted the employees as either administrative or productive workers. The critical inquiry was whether the inside salesperson's primary work duty was directly related to the employer's management policies and general business operations or to the production process.

The courts gave great weight to Cooper's stipulation that its primary business purpose is to "produce sales of electrical products." Based upon this statement, the Third Circuit embraced the district court finding that Cooper's inside salespersons "engage in activities relating to the day-to-day 'production' of sales within the plain meaning of the regulation rather than the administrative operation of the business."[12]

Whether an employee is exempt under the FLSA's "administrative" exemption is determined by the employee's actual work activities, not by the nature of the employer's business.[13] By using Cooper's characterization of its business purpose to define the primary duties of individual employers, the lower courts' construction of the Act is inconsistent with its purpose and intent.

Basic statutory law requires that a specific section be read in comity with a surrounding body of work. Reconciling laws with other, similar laws is the best method of interpreting them. Here, however, the courts did not look to the definition of "production" as further described in the FLSA. The Act specifically provides, in detail, a definition of the types of employees engaged in "production." 29 U.S.C.A. 203(j). It is true that "productive" employees as described by the courts are not limited to those engaged in actual physical work on the product itself. However, a relationship to the production of goods must be present. The primary duty of employees engaged in the "indirect production of goods for commerce" must perform work that is

---

[12] *Dole v. Cooper*, No. 87-2568, slip op. at 10 (D.N.J. May 17, 1990)

[13] *See, e.g., Mitchell v. H.B. Zachry Co.*, 362 U.S. 310 (1960); *Mitchell v. Household Finance Corporation*, 208 F.2d. 667 (3rd Cir. 1953)

closely related and directly essential to the production process. *See, e.g. A.B. Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942); *Borden Co. v. Borella*, 325 U.S. 679 (1945); *Roland Electrical Co. v. Walling*, 326 U.S. 657 (1946).

There is absolutely no rationale to align the inside sales process with that of production. Sales employees in the service area can be non-exempt, just as employees in production can be. Production includes the administration, planning, management, and control of the various physical processes of production, together with accounting, clerical, and manual activities. All of these employees are engaged in production, yet many of these employees are considered exempt as executives, administrators, or professionals. Neither administration, production, or sales is mutually exclusive, and no employee should be denied exempt status based on a label.[14] The exemption provided white collar employees is not determined by the commercial process involved but instead by a thorough analysis of the responsibilities of the specific position and the requirements of the Department of Labor regulations.

The courts below incorrectly and summarily dismiss inside salespersons as production workers. Notwithstanding that certain non-manufacturing employees may be considered "production" workers, sales positions under the FLSA have never been considered as such. The Department of Labor's own interpretive regulations clearly provide a basis for exemption in 29 CFR §541.207(d)(2) which states that "certain wholesale salesmen . . . who are given reasonable latitude in carrying on negotiations on behalf of their employers" meet the requirement of exercising discretion and independent judgment for exemption as an administrator, thus refuting the finding of the Appellate Court that the work of inside salespersons is not important.

By focusing entirely on the function of inside sales as

---

[14] 29 CFR §541.201(b)(2) provides in part: "(2) Many more examples could be cited to show that titles are insufficient as yardsticks...the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities and salary meet all the requirements of the section of the regulations in Subpart A of this part."

'production' in an individual sales organization, the court's analysis overlooks the significance of that function and misapprehends the extent of its impact upon the industry. The determination that Cooper's inside salespersons were production workers overshadowed the considerations of the court and skewed the analysis. The Department of Labor regulations flesh out the character of "administrative" activity as those operations "servicing" a business — such as, advising the management, planning, negotiating, representing the company, purchasing, promoting sales and business research and control. 29 CFR §541.205(b). Contrary to the Department's own interpretive guidelines, the lower courts chose to find that the administrative operations performed by Cooper's inside salespersons — advising the management, negotiating, representing the company and promoting sales — were " 'part and parcel' of the activity of 'producing sales.' "[15]

To take such a position is to deny all chance of administrative exemption in the wholesale-distribution industry since each and every key person in the industry works in a position that produces sales. However, by no stretch of even the most imaginative mind could each of them be considered to be engaged solely in "production" work and therefore not exempt. The Appellate Court discounted the administrative duties of the inside sales position because of its stated conviction (albeit an incorrect one) that the inside salesperson is a production employee. The court argued that if the inside salesperson's "primary responsibility" is to produce sales, any other function would be seen as a secondary responsibility.[16]

The prime function in wholesale-distribution is that of bringing products to market (i.e., sales). If nothing is sold or bought, there is no need for any other functions to be performed. All employees of the wholesaler-distributor are involved in the primary function which is sales. The fallacious reasoning of the Department of Labor and the courts below would take out the

---

[15] *Martin v. Cooper Electric Supply*, 940 F.2d 896, 904 (3d Cir. 1991)(quoting *Dole v. Cooper Electric Supply Co.*, No. 87-2568 (D. N.J. May 17. 1990))

[16] *Id.*

exemption for all employees of wholesaler-distributors. Indeed, it would eliminate the exemption for all employees in all businesses. Thus, such a result demonstrates the importance of this case and the need for it to be evaluated by this court.

The FLSA has been in existence since 1938. It gives the Department of Labor broad authority over the pay practices of employers. Since its enactment numerous regulations have been issued interpreting the law. The law has also been amended. It is without doubt a difficult law to understand and has been the basis of many court decisions seeking clarifications. Such clarification is vital here where technology and an ever changing marketplace have evolved the inside sales function in the wholesale-distribution industry into a role totally at odds with the position taken by the Department of Labor and the narrow and strained interpretations by the courts below which ignore current-day business conditions and practices.

Inconsistent and incorrect interpretation of the FLSA by the Department of Labor makes it difficult and at times almost impossible to comply. Fast paced changes in interpretation which do not reflect an accurate evaluation of what is actually occurring in the real business world of wholesale-distribution can be dizzying and costly to employers who find themselves retroactively liable for non-compliance with laws that are interpreted in such a manner as to defeat legislative intent. The Act directs the Department of Labor to write and interpret regulations to provide an administrative exemption. The undesirable result of the decisions below is that the statutory direction to afford an exemption is effectively eliminated in the wholesale-distribution industry. This creates a problem that is crucial not only to the petitioner herein but to the thousands of businesses and their employees who are engaged in the wholesale-distribution business.

It is necessary that any further excursions by the Department of Labor beyond its operative statute be stopped. An amendment by regulation is an unwarranted intrusion upon the legislative sphere.[17] Positive action on the Petition for Writ of Certiorari

---

[17] *See, Lubrizol Corporation v. Environmental Protection Agency*, 562 F.2d 807 (1977)

is imperative. This case involves issues that are vital to all employers and employees. It requires a resolution based upon a consideration of business practices as they now exist, and a result which does not summarily dispose of vital factors needed for evaluation by clamping incorrect labels on job functions.

CONCLUSION

For the foregoing reasons, we respectfully submit that petitioner's writ of certiorari be granted.

Respectfully submitted,

LOUIS R. MARCHESE
ROBERT W. BAKER
20 North Wacker Drive
Chicago, IL 60606
(312) 782-1829

Attorneys for Amicus Curiae

Of Counsel

HALFPENNY, HAHN, ROCHE & MARCHESE
20 North Wacker Drive
Chicago, IL 60606